No. 77-681

In the

Supreme Court of the United States

October Term, 1977

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD,

Petitioners,

v.

W. MICHAEL BLUMENTHAL, Secretary
of the Treasury of the United States, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision in this case of the United States Court of Appeals for the District of Columbia Circuit, rendered on June 15, 1977.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is reported at 390 F. Supp. 927 (D.D.C. 1975). The majority decision of

the Court of Appeals is as yet unreported and is printed as Appendix A, hereto. The common dissent in the instant case and in *American Society of Travel Agents, Inc. v. Blumenthal* is also unreported and is reprinted as Appendix B, together with the majority opinion in the *Travel Agents* case.

JURISDICTION

The judgment of the District Court was filed on February 5, 1975. The majority opinion of the Court of Appeals was filed on June 15, 1977. Thereafter, on June 27, 1977, the petitioners filed a motion asking for an extention of time for filing a motion for rehearing until 14 days after the dissenting judge filed his separate views, but this motion was denied. Petitioners then asked this Court for an extension of time for filing a petition for a writ of certiorari, and, by order dated August 22, 1977, the period for filing this petition was extended to and including November 12, 1977. The opinion of the dissenting judge in the Court of Appeals was filed September 15, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. When determining whether a plaintiff has standing to sue, has this Court allowed the zone of interest test to "become extinct"?

2. If not, was the zone of interest test properly applied by the Court of Appeals to bar a suit by a domestic oil producer who suffers actual competitive injury as

a result of erroneous and illegal Internal Revenue Service rulings which benefit the foreign operations of his competitors?

STATUTES INVOLVED

The statutes involved are 5 U.S.C. Sec. 702, and 26 U.S.C. Secs. 901 and 7805.

STATEMENT OF THE CASE

Petitioner Tax Analysts and Advocates (TAA) is a nonprofit corporation organized under the laws of the District of Columbia in 1970 for the purpose of promoting tax reform. It represents over 175 individual supporters, each of whom is a United States taxpayer who has contributed financially to TAA to ensure that the Internal Revenue Service (IRS) does not grant special interest groups unduly favorable tax treatment beyond that which the IRS may lawfully provide.

Petitioner Thomas F. Field is the owner of the entire working interest in a small, currently producing oil well located in Venango County, Pennsylvania. The well is not subject to price controls, and the price received for its output is therefore determined by "the price of the approximately 15 percent of energy imported [into the U.S.] as oil. . ."[1]

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[1] The quoted language is from the 1975 *Economic Report of the President*, transmitted to Congress in February 1975. That report states, at pages 74-5, that "The structure of the U.S. energy market is such that the price of the approximately 15 percent of energy imported as oil sets the unconstrained domestic energy price as well."

Section 7805 of the Internal Revenue Code empowers the Secretary of the Treasury to promulgate rules and regulations for the enforcement "of this title". Section 901 of the Code is among those with respect to which both rules and regulations have been published. That section allows qualifying United States taxpayers to claim a foreign tax credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."

Under Section 901(b), a credit against federal income taxes can be taken only for foreign *income* taxes paid; no credit is allowed for foreign sales taxes, excise taxes, or severance taxes. Nor may a credit be claimed for royalties paid to a foreign government. These non-income taxes and royalties are treated as ordinary business expenses; they therefore result in a *deduction* from gross income rather than in tax credits which can offset U.S. tax on a dollar-for-dollar basis.

Beginning in the 1950's, the principal oil producing nations in the Middle East, North Africa, and South America promulgated a series of formal income tax statutes which appeared to impose net income taxes on United States companies producing oil in those nations. In 1955 and 1968, the Internal Revenue Service published rulings that the "income taxes" paid on oil production to Saudi Arabia and Libya, respectively, were creditable taxes. Rev. Rul. 55-296, 1955-1 Cum. Bull. 386; Rev. Rul. 68-552, 1968-2 Cum. Bull. 306. In addition, the Internal Revenue Service has issued a substantial number of unpublished rulings to United States oil companies, holding that payments of "income taxes" made to the other principal OPEC nations are also creditable taxes under Section 901.

In recent years, the nature of the purported "income taxes" imposed on oil production by the principal oil exporting nations has changed both in character and amount. Since at least 1973, if not earlier, the purported "income taxes" imposed by the OPEC governments have been calculated so as to produce a fixed per barrel "government take" without regard to the profits or losses of the producing firms.[2] Because these imposts are calculated on a fixed per barrel basis, and because they have no relationship to the actual gross or net income of the oil companies paying them, it seems quite obvious that they no longer constitute creditable income taxes – if they ever did.

The Treasury Department is aware of these facts. For example, in his November 18, 1975 speech to the National Foreign Trade Council, Charles M. Walker, who was then the Assistant Secretary of the Treasury for Tax Policy, stated that ". . . the tax systems of the OPEC countries impose very high taxes which have many of the characteristics of royalties." And a prominent, recent scholarly study makes the same point:

> There is every reason to assert that the bulk of the oil company payments to host countries are in fact royalties and that this is relevant to the eligibility of these payments for full foreign tax credit.
>
> * * *

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[2] The computation of the OPEC "government take" involves multiplication of the number of barrels produced in a given period by a constant figure which is a percentage of a fictional reference price selected by the respective foreign governments to provide the desired per barrel government revenue, reduced by a fixed per barrel amount

(continued)

> On the grounds of tax theory, therefore, the extension of the foreign tax credit to the OPEC charge is highly questionable.[3]

In light of these facts, petitioner Tax Analysts and Advocates on February 19, 1974 filed a detailed administrative petition with the Commissioner of Internal Revenue explaining the impact of the conversion of OPEC taxes into a fixed per barrel "government take" and pointing out the illegality under those circumstances of the Internal Revenue Service rulings permitting the "income taxes" in question to be credited against U.S. tax liabilities. The petition also called on the Commissioner to exercise the discretion granted by Section 7805 to revoke the rulings in question. The Commissioner did not respond.

Petitioners Tax Analysts and Advocates and Field then filed a complaint on June 17, 1974, seeking a declaratory judgment that the challenged Internal Revenue Service rulings were unlawful, and asking for an injunction requiring the Internal Revenue Service to withdraw them. This complaint was subsequently amended on August 13, 1974. Both the original and the amended complaint pointed out

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[2] (continued)
denominated as a "royalty" and small per barrel operating costs. For further information on the computation, see *Petroleum Intelligence Weekly*, January 14, 1974, at page 6. For further information on the changes made by OPEC in the method of computing the "government take", see the *Middle East Economic Survey*, December 28, 1973, p. 3a and December 13, 1974 (supplement).

[3] Gerard M. Brannon, *Energy Taxes and Subsidies: A Report to the Energy Policy Project of the Ford Foundation* (1974) pages 94-96.

that the revenue loss to the United States Treasury, if the challenged rulings were not revoked, would be approximately $3 billion in 1974.

In addition to this revenue loss to the Treasury, petitioner Field sought relief in the amended complaint from two injurious effects of the challenged IRS rulings which he suffered in his capacity as a domestic oil producer. He pointed out, first, that the price for foreign oil charged by the oil producers who have received the challenged rulings determines the market price for oil in the United States (see footnote 1, *supra*) and that these prices are lower because of the tax advantages conferred by the rulings. Therefore, the rulings result in his obtaining lower prices for his oil production.

Field also alleged that the Internal Revenue Service rulings increase the net income from foreign oil production over what it would be if payments to foreign governments could only be deducted from gross income, as is the case domestically. This results in higher investment returns from foreign oil production than from domestic production, and lessens the price that Field could receive if he were to offer his working interest for sale.

Petitioner Field also alleged that he would be required to pay higher federal income taxes because the Internal Revenue Service rulings improperly reduce the tax burden of American companies producing oil abroad. Petitioner Tax Analysts and Advocates alleged that its supporters, as federal taxpayers, would likewise be required to pay higher federal income taxes.

On February 5, 1975, the District Court issued an opinion and order dismissing the complaint solely on the ground

that petitioners lacked standing. 390 F. Supp. 927 (D.D.C.) Thereafter, both petitioners appealed.

The Court of Appeals, with one judge dissenting, concluded that both petitioners, as taxpayers, lacked standing "because they have suffered no judicially cognizable injury in this capacity. . . " In addition, while acknowledging "that appellant Field has suffered injury in fact" in his capacity as a domestic oil producer, it also held that he failed to satisfy the "zone test" which was announced by this Court in 1970.[4] The existence (or lack of existence) of the zone test, and its possible contours, are therefore the focus of this petition.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH THE TEACHING OF THIS COURT IN ALL OF ITS RECENT MAJORITY OPINIONS ABOUT STANDING.

Since 1970, when it announced the "zone test" in *Association of Data Processing Organization v. Camp*, 397 U.S. 150, this Court has decided twenty major standing cases, almost all of them by a divided Court. With respect to the so-called "zone test," the teaching of the eighteen most recent of these decisions seems to be unequivocal: the zone test is dead.

The suggestion that the zone test for standing has been allowed to die a natural death has been strongly advanced

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[4] The zone test was developed and applied in two companion cases: *Association of Data Processing Organizations v. Camp*, 397 U.S. 150, and *Barlow v. Collins*, 397 U.S. 159.

by Professor Kenneth Culp Davis, probably the leading American writer on the subject of administrative law. In the introduction to the July 1977 Cumulative Supplement to his *Administrative Law of the Seventies* he states (p. 6) that:

> The "zone" test enunciated in 1970 was unsatisfactory, but it has apparently died from neglect; the Supreme Court has not asserted it since 1970 although it has been relevant to many cases.

Similarly, in the text of his July 1977 Supplement, Professor Davis states (at p. 181) that:

> The [Supreme] Court deserves commendation for its benign neglect of the "zone" test it enunciated in 1970 in the *Data Processing* opinion. Since the Court has not mentioned that test in its latest eighteen majority opinions about standing, and since it was relevant to a good many of the cases . . . it has become extinct, as it should.

Thus, if the teaching of the leading American scholar on the subject of standing is accepted, the Court below has erred by reviving an "unsatisfactory" test of standing, which this Court has allowed to "become extinct." Not only does this deny justice to the petitioners, but it improperly prevents adjudication of a case which presents questions of considerable public importance.

On the other hand, if Professor Davis is wrong in his interpretation of this Court's eighteen most recent standing decisions, it is highly important to make that point clear, for the guidance of the lower courts and practitioners. Otherwise, the unfortunate ambiguity that now surrounds the zone test will continue to create mischief.

II

THE COURT OF APPEALS DECISION CONFLICTS WITH THOSE OF OTHER APPELLATE COURTS.

A. As to whether the zone of interest test is dead:

As the majority opinion of the Court of Appeals in this case has pointed out, "at least one circuit court has chosen forthrightly to state its opposition to the [zone of interest] test." The case to which the majority refers is *Park View Heights Corporation v. City of Black Jack*, 467 F.2d 1208 (C.A. 8, 1972). That case reversed a District Court's holding that two nonprofit corporations and eight individual plaintiffs lacked standing to challenge a municipal zoning ordinance. At the beginning of its discussion of the standing issue (p. 1212, n. 4) the Eighth Circuit stated:

> At this beginning point of our "standing" discussion, we record our preference for simplifying the "law on standing." We think that all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of "injury in fact".

Accordingly, if petitioner Field, or another similarly situated individual, were to bring the present suit in the Eighth Circuit, he would have standing. An important right, such as access to the courts for the redress of injuries, should not depend to such an extent on the geographical location in which suit is brought. Review by this court is needed to establish greater geographical uniformity with respect to the zone test, assuming that test still exists.

B. As to whether maintenance of competitive fairness is one of the interests protected by the Internal Revenue Code.

The result of the Court of Appeals decision in this case is to leave business competitors without effective judicial protection when the Commissioner of Internal Revenue abuses the discretion granted him under Section 7805 of the Internal Revenue Code, through the issuance of rulings that favor one competitor at the expense of another. The Appeals Court is quite frank about this: "The existence of competitive ramifications flowing from the challenged agency action," it states at page 26 of the slip opinion, "is not sufficient evidence to infer that Congress arguably intended to protect or regulate competitive interests."

This aspect of the Court of Appeals opinion is sharply in conflict with the landmark decision of the Court of Claims in *International Business Machines Corp. v. United States*, 343 F.2d 914 (1965), *cert. denied*, 382 U.S. 1028 (1966). That case, like this one, involved a situation in which the Internal Revenue Service had favored one competitor over another by the issuance of a ruling that was erroneous and illegal. The International Business Machines Corporation argued that the Internal Revenue Code did not permit discrimination of this sort.

In the course of accepting IBM's arguments, the Court of Claims pointed out (at p. 920) that abuse of the discretion granted to the Commissioner of Internal Revenue with respect to rulings is reviewable "in the same way as other discretionary administrative determinations." It also stated that Section 7805(b) of the Internal Revenue Code embodied the Congressional intent that the Court of Appeals in the present case was unable to discern:

> Congress can direct the Service and the courts to take account, in a specified area, of discrimination, of equality of treatment, and of the tax burdens imposed on competitors or persons in the same or a comparable situation. Where that is what Congress has declared, the policy of the tax law emphasizes, in that particular sector more than in the rest of the tax field, the component of equal treatment; courts are then bound to vindicate that special interest just as they are, generally, to see that the uniform taxes Congress has sought to levy are paid . . . With respect to Internal Revenue Service rulings and regulations, the Congressional mandate does direct administrative and judicial attention to this factor of equality (among others). *International Business Machines Corp., supra,* at 919

The fact that the present case involves competitive discrimination arising from IRS rulings issued under Section 901 of the Internal Revenue Code, whereas the *IBM* case involved rulings issued under Section 4191, is not a point of distinction, because the discretion granted under Section 7805 of the Code extends to all rulings and regulations "for the enforcement of this title." As a consequence, were the *IBM* case to arise today, it seems probable that, in addition to the other standing objections raised in the 1965 case by the government, the firm would also be faced with the claim that the Internal Revenue Service has what the dissenting judge in the present case calls "virtually unfettered discretion in adjusting . . . economic relationships." (See dissent, p. 2, n. 2)

III

THE COURT OF APPEALS DECISION HAS IMPORTANT IMPLICATIONS BOTH WITHIN AND BEYOND THE TAX AREA.

A. The decision will further aggravate the chaotic situation faced by the lower courts when they seek to determine the status of the zone test.

Currently, both judges and litigants face a chaotic situation when seeking to determine the justiciability of a claim in light of the zone of interest test. The existing confusion should be ended. The majority opinion in the Court of Appeals in the present case contains (slip opinion, p. 13) a plea for greater clarity in this area:

> . . . [The Supreme] Court has not attempted a detailed explanation of the purpose, meaning, or scope of the [zone test] standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism. There has also been confusion in the application of this prudential standard in the courts. Some courts have chosen to ignore the zone test; at least one circuit court has chosen forthrightly to state its opposition to the test. Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied. (Footnotes omitted.)

A judicial standard which is so thoroughly riven with ambiguity and imprecision is a fertile source of both wasted judicial effort and inequality in the treatment of similarly situated parties. Accordingly, the zone of interest test cries out for clarification – or for decent burial.

B. The decision of the Court of Appeals will produce unfettered and unreviewable administrative discretion with respect to IRS rulings that lose revenue.

Internal Revenue Service rulings are regularly reviewed by the courts, but the rulings which are commonly subjected to judicial scrutiny are those that have *increased* an individual's or a firm's tax payments. The peculiarity of this case, like the *IBM* case, *supra*, is that it involves so-called "giveaway rulings." These are IRS administrative determinations that *lose* rather than raise revenue.

Revenue-losing IRS rulings have had – and continue to have – an important impact on our tax system. Whether they can be subjected to judicial scrutiny will be determined to a considerable degree by the outcome of this case. Unless such rulings can be subjected to judicial review in an orderly manner, we will be faced with what the dissenting judge in the Court of Appeals calls (dissent, p. 2, n. 2) "The spectre of . . . unreviewable discretion [which can be] exercised in contradiction to the commands of Congress . . ."

Provided that injury in fact is demonstrated, both revenue-losing and revenue-raising IRS rulings should be subjected to judicial review in the same fashion. To the extent that the zone of interest test is a barrier to that legitimate goal, it should be interred or appropriately modified. The Commissioner of Internal Revenue should not be empowered to commit wrongs for which there is no judicial remedy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. FIELD
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Thomas F. Field, attorney for the petitioners and a member of the bar of the United States Supreme Court, do hereby certify that on this 11th day of November 1977, I served copies of the foregoing petition for writ of certiorari on the attorneys of record for the respondents herein, Scott P. Crampton, Earl J. Silbert, Richard Farber, and Leonard J. Henzke, Jr. and on the Solicitor General of the United States, Wade H. McCree, Jr., by mailing three copies of the same, postage prepaid, to each of them at their offices at the Department of Justice, Washington, D.C. 20530, and (in the case of Silbert) at the U.S. Courthouse, Washington, D.C. 20001.

Thomas F. Field
Attorney for Petitioners

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1304

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD, APPELLANTS

v.

MICHAEL BLUMENTHAL, Secretary of
Treasury of the United States, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-917)

Argued 8 January 1976

Decided 15 June 1977

Joseph Onek, with whom *Eldon V. C. Greenberg* and *Richard A. Frank* were on the brief, for appellants.

Leonard J. Henzke, Jr., Attorney, Tax Division Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States

Attorney, and *Richard Farber*, Attorney, Tax Division Department of Justice, were on the brief, for appellees.

Before: BAZELON, *Chief Judge*, TAMM and WILKEY,* *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

Chief Judge Bazelon dissents and will file a statement of separate views at a later date.

WILKEY, *Circuit Judge*: The appellants in this case are Tax Analysts and Advocates (TAA), a non-profit corporation organized under the laws of the District of Columbia for the purpose of promoting tax reform, and Thomas F. Field, Executive Director of TAA. Appellants filed suit in the District Court [1] seeking a declaratory judgment that certain published and private rulings of the Internal Revenue Service (IRS) allowing tax credits for payments made to foreign nations in connection with oil extraction and production are contrary to the Internal Revenue Code (Code) and therefore unlawful.[2] In addition, appellants sought an injunction requiring the IRS to withdraw the rulings and to collect taxes from oil companies for all periods not barred by the statute of limitations in those cases where foreign tax credits were taken pursuant to the ruling.[3] Both appellants claim to have standing to sue as federal taxpayers; TAA makes this claim as the representative of its members, who are federal taxpayers,[4] while appellant Field relies on his status as an individual taxpayer.[5] In addition, appellant Field contends that he had standing as a competitor in his capacity as the owner of the entire working interest in a currently producing domestic oil well.[6]

On a motion by the defendants,[7] the District Court (Hart, J.) dismissed the complaint [8] on the grounds that appellants lacked standing to bring the action.[9] We agree with the District Judge and conclude that both appellants lack standing as federal taxpayers because they have suffered no judicially cognizable injury in this

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* After oral argument, District Judge Justice, United States District Judge for the Eastern District of Texas, the third member of the panel, who was sitting by designation pursuant to 28 U.S.C. § 292(d), found it necessary to recuse himself. By random selection, Circuit Judge Wilkey was assigned to replace him on the panel and was assigned to write the opinion on 9 February 1977.

[1] Jurisdiction is alleged under 28 U.S.C. §§ 1340, 2201, 2202, and 5 U.S.C. §§ 702, 703. Amended Complaint, ¶ 2, Joint Appendix (J.A.) at 39. These latter statutory provisions no longer serve as a basis for jurisdiction in the federal courts. *See Califano* v. *Sanders*, 45 U.S.L.W. 4209, 4211 (23 Feb. 1977).

Prior to the filing of this suit in the District Court, appellants filed a petition with the Commissioner of the Internal Revenue Service seeking to have the Revenue Rulings at issue in this case revoked. According to appellants, no response was made to the petition. Amended Complaint, ¶¶ 23, 24, J.A. at 45.

[2] Amendment Complaint, J.A. at 45.

[3] *Id.* at 45-46.

[4] *Id.* ¶ 3, J.A. at 39.

[5] *Id.* ¶ 4(a), J.A. at 39.

[6] *Id.* ¶ 4(b), J.A. at 39-40. The oil well is located in Venango County, Pennsylvania; the oil produced at this location is not subject to price controls imposed by the federal government. *Id.*

[7] The defendants in this case are the Secretary of the Treasury and the Commsisioner of the IRS. Both are sued in their official capacities. Amended Complaint, ¶¶ 5, 6, J.A. at 40.

[8] Appellants filed their original complaint on 17 June 1974. The complaint was amended on 13 August 1974 to reflect appellant Field's acquisition of the entire working interest in a domestic oil well.

[9] 390 F. Supp. 927 (D.D.C. 1975).

capacity, and thus affirm the District Court on the rationale stated in its opinion.[10] In addition, we conclude that Appellant Field, while suffering injury in a fact as a competitor dealing in oil extraction and production, does not assert an interest that falls within the "zone of interests" protected by the relevant provisions of the Code and therefore does not have standing in this context. Accordingly, we affirm the order of the District Court.

I. The Nature of Appellants' Challenge

A. *The Challenged Agency Action*

Section 901(b) of the Code allows qualified citizens of the United States and domestic corporations to claim

[10] As federal taxpayers, both appellants claim "a personal pecuniary interest in requiring that the IRS assess and collect taxes owed by other taxpayers to the fullest possible extent under the provisions of the Code." Amended Complaint, ¶¶ 3, 4, J.A. at 39. According to the appellants, the published and private IRS rulings at issue in the case cause injury in fact to this interest by decreasing the amount of taxes paid into the Federal Treasury by United States companies operating abroad in the area of oil extraction and production. Appellants aver that the monetary loss to the United States Treasury attributable to the treatment of the foreign income taxes on income from oil production as creditable against United States tax liability, rather than as deductible costs of business, amounted to $3 billion in 1974. Amended Complaint, ¶ 16, J.A. at 42. According to appellants, this decrease in revenue causes their federal income taxes to rise in some unstated amount.

With respect to these claims of taxpayer standing, we affirm the District Court's finding of no injury in fact and adopt the reasoning of the District Court as put forth at 390 F.Supp. 932-38. Since appellants have not satisfied this basic constitutional requirement of injury in fact, there is no need to explore the other inquiries relevant to prudential limitations on standing. *See* text and notes at notes 29 to 34, *infra*. *See also Harrington* v. *Bush*, No. 75-1862, Slip Op. at 28 n.68 (D.C. Cir. 18 February 1977).

a tax *credit* for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. . . ." [11] This credit can be taken only for foreign income taxes paid;[12] no credit is allowed for the payment of excise taxes, severance taxes, mineral royalties, or similar payments to foreign governments. Excise taxes, severance taxes, and royalty payments are treated, when appropriate, as ordinary business expenses and therefore result in *deductions* from gross income rather than in tax credits which can offset tax liability on a dollar-for-dollar basis.

Beginning in the 1950's, the principal oil producing nations in the Middle East, North Africa and South America promulgated a series of formal income tax statutes which imposed net income taxes on United States companies producing oil in those nations.[13] In 1955, the IRS published Revenue Ruling 55-296 which allowed a foreign tax credit for income taxes paid to Saudi Arabia.[14] In 1968 the Service promulgated Revenue Ruling 68-552 allowing a foreign tax credit for income taxes imposed by Libya.[15] In addition, the IRS has issued several private rulings allowing foreign tax credits for

[11] 28 U.S.C. § 901(b)(1).

[12] 28 U.S.C. § 903 provides that "the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country. . . ." Appellants claim that the payments to foreign nations at issue in this case cannot be considered as "in lieu of" taxes within the meaning of Section 903. We accept this contention as being true for the limited purpose of ruling on the question of standing. *See* note 19, *infra*.

[13] Amended Complaint, ¶ 9, J.A. at 40.

[14] 1955-1 Cum. Bull. 386.

[15] 1968-2 Cum. Bull. 306.

income taxes levied by Iran, Kuwait, and Venezuela in connection with oil production in those countries.[16]

Appellants contend that the income taxes paid by United States companies to the foreign nations listed above are not creditable taxes within the meaning of Section 901(b) of the Code. Rather, appellants assert that these taxes are in substance either rolayties paid for the right to extract oil from land owned by the foreign nations, or excise, severance, or similar taxes which are not creditable under Section 901(b).[17] Appellant Field, as the owner of a domestic oil well, pays the owner of the land on which his well is located a regular royalty payment for the right to extract oil from the land;[18] under the Code, appellant can deduct these payments from gross income but cannot credit them against his tax liability. In effect, appellants allege that the IRS has exalted form over substance in allowing the tax credits at issue; all of the injuries which appellants put forth to support their standing flow from this decision to treat the foreign income taxes as creditable taxes, rather than as deductible expenses, for their taxpaying competitors.

Having outlined the substantive merits of appellants' claims, it remains to relate this aspect of the case to the issue of standing. Under the relevant Supreme Court directive, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[19] This standard of review dictates that we assume that the IRS has improperly allowed a tax credit for the payments to foreign nations in connection with oil extraction and production.

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[16] Amended Complaint, ¶ 10, J.A. at 41; Brief for Appellees at 5.

[17] Amended Complaint, ¶ 12, J.A. at 41.

[18] Amended Complaint, ¶ 18, 19, J.A. at 42.

[19] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

This assumption as to illegality does not in and of itself confer standing on anyone to challenge the illegality.[20] Rather, as this court has stated, "*the proper inquiry is whether the illegality does injury to an interest of the complaining party.*"[21] We now turn to an examination of the interests and injuries put forth by appellant Field to support his standing as a competitor in this case.[22]

B. *Competitor Standing*

As an independent domestic oil producer, appellant Field competes in the domestic market with those companies which are granted tax credits for the income taxes paid to foreign nations. As a competitor, appellant Field claims that the Internal Revenue Code grants him a protected interest in competitive fairness and equity in matters of federal taxation which has been injured by the published and private rulings made pursuant to Section 901(b). Appellant believes that this asserted interest confers on him the right to "challenge[] as inequitable and illegal the favorable treatment received by others as a result of Internal Revenue Service action."[23]

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[20] *See United States* v. *Richardson*, 418 U.S. 166, 179 (1974); *Harrington* v. *Bush*, *supra*, note 10, Slip. op. at 11 n.31.

[21] *Harrington* v. *Bush*, *supra* note 10, Slip. op. at 11 (emphasis in original).

[22] The issue of taxpayer standing has been dealt with in text and notes at notes 4 to 10, *supra*, and will not concern us during the remainder of our analysis.

[23] Brief for Appellants at 18. There are statutory provisions providing for judicial review of IRS action at the request of one whose taxes are in question. See 26 U.S.C. § 6123(a). These challenges usually take place within the context of a refund or deficiency suit.

[Continued]

Appellant alleges two injuries in his capacity as a competitor. As the first injury appellant Field alleges that the IRS rulings "result in his obtaining lower prices for his oil production than he would receive if the international companies could only deduct and not credit their oil production related payments." [24] The rulings at issue in this case enable the international companies to pay far less income tax to the United States than if these payments were merely deductible. A substantial portion of the oil produced in Saudi Arabia, Libya, Kuwait, Iran and Venezuela by United States companies is exported to the United States. The prices charged by the international companies largely determine the market price for uncontrolled crude oil received by independent producers such as appellant Field. According to appellants, the lower taxes paid by the international companies allow these companies to sell their foreign oil in the United States at lower prices than would prevail if the companies could only deduct and not credit their foreign income tax payments.[25] Thus, as a consequence, appellant Field contends that the IRS rulings result in competitive injury due to the loss of potential income in the sale of his domestically produced oil.

The second injury of a competitive nature alleged by Appellant Field concerns the impact of the challenged rulings on the value of his operating interest in his domestic oil well. According to appellant Field, the

[23] [Continued]

Appellant presents a different type of case in this action by attempting to use alleged competitive injury to himself as the basis for the challenge of the IRS action; he does not put forth the question of his own tax liability or that of the international companies taking advantage of the tax credit allowed by the challenged rulings as the basis for his standing.

[24] Amended Complaint, ¶ 18, J.A. at 44.

[25] *Id.* § 19, J.A. at 44.

challenged IRS rulings increase the net income from foreign oil production over what it would be if the foreign payments could only be deducted from gross income for federal tax purposes.[26] Thus, as a result of the rulings, foreign oil production yields higher investment returns and investors are more willing to invest in foreign oil production than they would be if the rulings had not been promulgated.[27] The value of foreign oil well investments is therefore increased relative to similar domestic investments, to the alleged competitive detriment of appellant Field.

The asserted competitive interest and alleged injuries presented by appellant Field will now be tested against the standards developed by the Supreme Court in the area of standing.[28]

II. Analysis of Standing Claims

A. *Preliminary Considerations*

The standing doctrine has two sources: the "case or controversy" requirement of Article III of the Constitution,[29] and judicially imposed rules of self-restraint known as "prudential limitations." [30] In the context of this case, we have occasion to apply both the constitutional and prudential dimensions of the standing doctrine and thus to illuminate the relationship between

[26] *Id.*

[27] *Id.*

[28] *See Harrington* v. *Bush, supra* note 10, Slip. op. at 28 n.68.

[29] The Supreme Court first clearly stated the constitutional nature of the injury in fact requirement in *Flast* v. *Cohen*, 392 U.S. 83 (1968) and has been consistent in this interpretation in all subsequent discussions of standing.

[30] *See Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

these two elements of the doctrine.[31] The Article III constitutional requirement is one of "injury in fact, economic or otherwise;" [32] such injury is the "irreducible constitutional minimum which must be present in every case." [33] If a court finds that there is no injury in fact, "no other inquiry is relevant to consideration of . . . standing." [34] The vast majority of the case law on standing at all levels of the federal court system has been directed at defining this constitutionally based concept of injury in fact.

Prudential limitations, on the other hand, are not constitutional requirements; these limitations are developed and imposed by the Supreme Court in its supervisory capacity over the federal judiciary.[35] It is clear that Congress may remove these prudential limitations by statute; Congress has chosen to exercise this authority on various occasions.[36] There has been no Congressional authorization of appellants' action here; therefore, the prudential limitations developed by the Supreme Court

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[31] We deny the claims as to taxpayer standing because we find no injury in fact; *see* note 10, *supra*. With respect to competitor standing, however, we recognize that injury in fact has occurred but proceed to deny standing based on a prudential limitation; *see* Part II.B.2, *infra*.

[32] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

[33] *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[34] *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 227 n.16 (1974).

[35] *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[36] For a collection of statutes in which Congress has removed the prudential standing barriers, *see* C. Wright, *et al.*, *Federal Practice and Procedure* ¶ 3531 (p. 71, 1977 Supplement). For the clearest example of the operation of this Congressional control over prudential limitations in the judicial context, *see Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

are fully applicable in this context.[37] To date, at least three prudential limitations have been announced by the Court. The first of these limitations to be enunciated, and the one which will be the focus of our concern in Part B.2, *infra*, is the so-called "zone test:" [38] "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or consitutional guarantee in question." [39] The two additional prudential limitations relating to causation [40] and redressability of the griev-

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[37] We believe that the fact that the limitations of the standing doctrine beyond injury in fact are termed "prudential limitations," does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and, in the context of cases such as the one now before us, we believe there is a nondiscretionary duty to apply the limitations. This duty to apply the standard does not detract from the discretion involved in determining whether the standard has been satisfied.

[38] The "zone test" is not a "test" in the sense that it is capable of mechanical application to a set of facts with an easily discernable and certain result. Rather, it is, as this court has stated, one of a *"series of inquiries"* designed to determine if a particular party has standing. *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 (emphasis in original). As an inquiry, the standard involves a great deal of discretion in its application. *See* note 64, *infra*. It is, therefore, for purposes of convenience that we refer to it as a "test;" this lable is not intended to obscure the discretion and necessary ambiguity inherent in the inquiry.

[39] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

[40] *See Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1973). *See also Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

ance [41] need not be faced in the context of this case. The application of the zone test to deny standing in this case bears out the notion that, as this court has stated, "a valid claim of standing rests on more than [the] assertion of [a judicially] cognizable injury." [42]

B. *Competitor Standing*

1. *Injury in Fact.* We conclude that appellant Field has suffered injury in fact in his capacity as a competitor.[43] Although appellant's economic injury is relatively small in magnitude,[44] this does not negate our finding of injury in fact.[45] Appellant Field has alleged "a distinct and palpable injury to himself" [46] which meets the requirements of Article III of the Constitution; given that the constitutional hurdle has been surmounted, we must now proceed to examine appellant's claim in light of the zone test.[47]

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[41] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 222 (1974). *See also Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[42] *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[43] *See Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

[44] The oil well owned by appellant Field is quite small; *see* Brief for Appellants at 11.

[45] *See United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973) (identifiable trifle is sufficient for purposes of standing doctrine). The appellee's arguments to the contrary are frivolous; *see* Brief for Appellees at 10, 26-27.

[46] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

[47] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

2. *Zone of Interests.* The zone test was announced and applied in 1970 in the companion cases of *Association of Data Processing Organizations* v. *Camp* [48] and *Barlow* v. *Collins.*[49] In addition, the test has been applied by the Court in two subsequent cases.[50] In applying the zone test in these four cases, the Court has not attempted a detailed explanation of the purpose, meaning, or scope of the standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism.[51] There has also been confusion in the application of this prudential standard in the courts.[52] Some courts have chosen to ignore the zone test;[53] at least one circuit court has chosen forthrightly to state its opposition to the test.[54] Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied.[55]

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[48] See note 32, *supra*. The *Data Processing* case also involved a claim of competitive injury.

[49] 397 U.S. 159 (1970).

[50] *Investment Co. Inst.*, v. *Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

[51] A complete bibliography of these criticisms is set forth in Note, Standing to Challenge Exclusionary Land Use Control Devices in Federal Courts after *Warth* v. *Seldin*, 29 Stan.L. Rev. 323 (1977). (hereinafter referred to as Note).

[52] *See, e.g., Pecos Ass'n* v. *Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971) ("The interests are within the zone protected by the APA").

[53] *See, e.g., Florida* v. *Weinberger*, 492 F.2d 488 (5th Cir. 1974).

[54] *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

[55] *See* K. Davis, *Administrative Law of the Seventies* 512 (1976).

The zone test admittedly presents the courts with an ambiguous and imprecise standard to apply; such ambiguity and imprecision are certainly not foreign to the courts, however, and none of the approaches to the zone test outlined above has contributed to the clarification of the concept.[56] Suggestions that the zone test is no longer a constituent element of the standing doctrine are, in our view, clearly incorrect. Indeed, all of the available evidence in Supreme Court cases suggests that the zone standard remains the law in this context.[57] We believe that the zone test is fully applicable in this context; since we rest our denial of standing to appellant Field as a competitor squarely on the zone standard, we shall put forth in some detail the manner in which this decision has been reached.

a. *Purpose of Zone Test.* The zone test serves no independent purpose but, rather, constitutes one method to ensure that the basic purposes and policies of the standing doctrine itself are effectuated. Although the purpose of the standing doctrine has been the subject of consider-

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[56] *See* notes 52 to 54, *supra*. In another context, Justice Powell has recognized that the prudential limitations are "less easily defined" inquiries than those involving injury in fact. *Singleton* v. *Wueff*, 44 U.S.L.W. 5218 (29 June 1976) (Powell, J., concurring in part and dissenting in part). The ambiguous nature of the prudential inquiries is not, without more, a valid reason to ignore the zone standard.

[57] In all of the Supreme Court's standing decisions rendered since the zone test was announced in 1970 in which the zone standard has not been applied but in which it has been appropriate to make reference to this test, the Court has cited this standard with approval. *See Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 686 n.13 (1973); *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 224 n.14 (1974); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

able debate among the commentators,[58] the Supreme Court has been consistent in identifying two basic purposes of the doctrine. The first purpose, or basic policy, is to ensure the complete adversarial presentation of the issues before the court.[59] The second purpose concerns the "proper—and properly limited—role of the courts in a democratic society."[60] That is, the standing doctrine can be employed to define the proper judicial role relative to the other major governmental institutions in the society.[61] As the Court has stated, the "prudential rules of standing . . . serve to limit the role of the courts in resolving public disputes."[62]

We believe that the zone test is particularly suited to the task of furthering the second stated purpose of the standing doctrine relating to the role of the federal judiciary. The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation—"the zone of interests to be protected or regulated by the *statute* . . . in question."[63] Thus, the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

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[58] *See* Note, *supra* note 51, at 335 n.72.

[59] *See Baker* v. *Carr*, 369 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).

[60] *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[61] *See generally United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974).

[62] *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

[63] *See* note 39, *supra*. (emphasis added).

By its choice of language, the Supreme Court has indicated that the zone test is a quite generous standard;[64] on the other hand, the test is obviously meant to serve as a limitation on those who can use the federal courts as a forum for grievances emanating from agency action taken pursuant to a particular statutory mandate. These competing considerations serve to frame the bounds of a court's discretion in applying the zone test. The discretion of a court to deny standing on the basis of the zone standard is not undefined; the zone test limitation is grounded in Congressional action as embodied in statute. The zone test therefore cannot be used arbitrarily to deny access to the courts; it is based on discerned Congressional purpose, a purpose which can be more clearly or differently defined as Congress wishes.

The most severe difficulties with the zone test derive from questions as to the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing. In particular, these difficulties revolve around the decision as to which statutory provision to examine for evidence of regulatory or protective intent and the proper role of legislative history in making the threshold decision on standing.

b. *Proper Statutory Provision.* The IRS rulings being challenged in this case were issued pursuant to Section 901 of the Code. The question then becomes: does the court look to this section of the statute (the Code) to determine which interests are arguably to be regulated or protected for purposes of the zone test, or should the court look to other sections of the statute for evidence of arguable regulatory or protective intent? The Supreme Court decisions dealing with the zone test do not provide

[64] The particular words which give the test this quality are "arguably" and "zone".

a conclusive answer to this inquiry.[65] As will be seen, this decision is of particular significance in the context of this case.[66] Appellants urge us to adopt the second alternative—to examine statutory provisions other than those which form the basis for the lawsuit.[67] In this regard, appellants refer us to additional provisions in the Code which they believe contain the necessary evidence of Congressional intent sufficient to satisfy the zone test in this case.[68] We cannot agree with this approach; instead, we shall look only to Section 901 of the Code in our application of the zone test. Why we should do so readily becomes apparent.

Our decision to adopt this approach rests on two reasons—one general, the other with particular reference to the statutory scheme involved in this case. Generally, the statutory provision at issue in a given case, in this instance Section 901 of the Code, frames the substantive issue which a court will decide if the action proceeds to a determination on the merits. If the necessary arguable intent is found in the particular provision, this fact further ensures that the complaining party will have a strong connection to the controversy and that it will serve the policy of complete adversariness in the litigation which has as its focus the particular statutory provision.[69] If, on the other hand, standing is granted on the basis of

[65] *See* cases listed at notes 48, 50, *supra*.

[66] *See* text at notes 69 to 70, *infra*.

[67] Appellants contend that we "must examine [the] general purpose" of the Code. (Brief at 20) to determine if the competitive interests "are within the zone of interests protected by the Internal Revenue Code." (Brief at 8). *See also* Brief for Appellants at 17-19.

[68] These additional provisions of the Code are sections 501, 502, 511-13, and 7805(b).

[69] *See* text and notes at notes 58 to 59, *supra*.

intent inferred from statutory provisions which perhaps embody *different* goals and policies, this connection to the controversy may well be lessened. Therefore, as a general rule we believe that the particular statutory section should be the focus of analysis when applying the zone test.

The wisdom of this decision to examine the particular statutory section is particularly apparent in the context of this case. The Internal Revenue Code is a extraordinarily complex statute which does *not* have a single, unified purpose. Rather, the Code is intended to accomplish a wide variety of economic and social goals and purposes. If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can "borrow" the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent, in the area of revenue collection.

In support of their argument that the court should look beyond the particular statutory provision, appellants refer us to the decision of this court in *Constructores Civiles de Centroamerica, S.A.* v. *Hannah.*[70] In that case action taken pursuant to the Foreign Assistance Act of 1961 [71] was challenged. In determining that appellants in that case satisfied the zone test, the court looked to the

[70] 459 F.2d 1183 (D.C. Cir., 1972).

[71] 22 U.S.C. § 2251 et. seq. (1970).

general statement of policy found in the statute.[72] Appellants in this case contend that the court's reliance on the broad general language of the preamble in the *Constructores* case supports their view that purposes embodied in other sections of the Code support their standing under the zone test. The court's action in *Constructores* was not, however, inconsistent with the technique we have chosen to employ in this case. In *Constructores* it was acceptable to examine both particular and general provisions because these provisions shared an identity of purpose. Indeed, in this context, it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose. No such similar situation is presented in this case and we therefore confine our inquiry to Section 901 of the Code.

c. *The Role of Legislative History.* In the process of deciding disputes which are properly before them, courts regularly examine in some depth and in great detail the legislative history of statutes involved in the disputes. In the context of applying the zone test to the issue of standing, however, such full-scale examinations of legislative history present special dangers and should therefore be avoided.[73] The dangers and deficiencies in the traditional approach to legislative history in this context are three in number.

First, and most significant, a full-scale examination of the legislative policy underlying a statutory provision may well lead to a prejudgment of the merits of the case. A canvassing of the entire legislative background may lead to a decision on the question of standing based on an assessment of the strength or weakness of the claims

[72] 459 F.2d 1183, 1188-89 (1972).

[73] *See Barlow* v. *Collins*, 397 U.S. 159, 168 (1970) (Brennan, J., concurring in the result and dissenting).

being presented.[74] Such a result or tendency would be inconsistent with a primary theme in the law of standing —that the question of standing is a matter apart and distinct from the merits of the substantive claims put forth.[75] It is totally acceptable to grant standing to a party to pursue an unsuccessful claim; a traditional examination of legislative history might well undermine this basic proposition.

Second, the question as to precisely which interests are meant to be regulated or protected by a statutory provision is not likely to have been faced in the legislative history in any convincing or dispositive manner. Rather, the express language of the statute is likely to be more accurate in this regard. Thus, as a source of evidence as to whether the particular interests of a particular plaintiff are within the relevant zone,[76] the legislative

[74] It was the fear of confusing the preliminary issue of *standing* with the *merits* which caused Justices Brennan and White in *Barlow* v. *Collins*, 397 U.S. 159, 168-170 (1970) to argue that examination of standing should stop with the constitutionally-spawned inquiry as to injury in fact and should not reach the "zone of interest" inquiry at all. By not relying on legislative history, as the Supreme Court indicated in *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970) was proper, we avoid the danger of the court settling the merits in the guise of ruling on standing and thus meet the concern voiced by Justices Brennan and White.

[75] *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

[76] We are aware of the confusion surrounding the meaning of which interests are relevant to the zone test. *See* K. Davis, Administrative Law Treatise § 22.00-1 (1970 Supplement). Essentially, the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant in-

history is likely to be unilluminating.[77]

Third, a full-scale examination of legislative history presents the distinct possibility that the generous nature of the zone test, which results from the language of the test itself, will be undermined. Such an approach may lead to a requirement that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected. Any tendency to move in this direction would detract from the flexibility of the zone standard provided by the requirement that the plaintiffs' interest be only "arguably" within the zone. Thus, if Congress had in general terms legislated against competition in a statute, it is not difficult to find that particular competitive interests, which may not have been mentioned in the legislative history at all, are "arguably" within the zone of interests.[78] The "arguable" language of the zone test thus serves to resolve potential ambiguities in the legislative history and obviates the need to consult it in the same detail as is done when the merits of the dispute are being resolved.

Given these deficiencies in the traditional techniques of fully examining legislative history, we believe the appropriate test to be as follows: whether the complaining party has stated an interest which is arguable from the face of the statute. Although the Supreme Court has not explicitly endorsed this as the appropriate operational

terests in the context of an application of the zone standard. Professor Davis agrees. *Id.*

[77] The success of a workable standing doctrine must be measured in some degree by the ease with which it can be applied. This more limited role for legislative history at this threshold stage in litigation promotes this additional goal.

[78] This is essentially what the Supreme Court did in *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970).

technique, it has come close to so doing in one case.[79] Thus, we believe that this approach is both consistent with the guidance we have been given by the Supreme Court and that it is supportive of other policies underlying the standing doctrine.[80]

C. *Application of Zone Test to Appellant Field.*

Having described what we believe to be the purpose of the zone test and the manner in which it should operate, it is now possible to formulate with precision the relevant zone test inquiry with respect to appellant Field's standing as a competitor: did Congress arguably legislate with respect to competition in Section 901 of the Code so as to protect the competitive interests of domestic oil producers?

We answer the posed query in the negative for the following reasons. The purpose of the tax credit provision of Section 901 of the Code is to prevent the double taxation of any United States companies operating abroad. This purpose is clear from the face of the statute itself, and has been consistently confirmed in the case law dealing with this particular provision in other contexts.[81]

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[79] *Id.*

[80] Having stated and justified this general approach to legislative history, it is necessary to state a *caveat*. We do not rule out *any* role for legislative history at this stage, and we would expect to be informed by the parties if the legislative history contained clear evidence of an intent either to allow the appellant's interests as a basis for standing or to deny standing to a party in this position.

[81] *See, e.g., Bunet* v. *Chicago Portrait Co.*, 285 U.S. 1, 2 (1932); *Bank of America National T.E.S. Ass'n* v. *United States*, 459 F.2d 513, 519 (Ct. Cl. 1972), *cert. denied*, 409 U.S. 949 (1972); *Rinehart* v. *United States*, 429 F.2d 1286, 1288 (10th Cir. 1970); *Associated Tel. & Tel. Co.* v. *United States*, 306 F.2d 824, 832-33 (2d Cir. 1962), *cert. denied*, 371 U.S. 950 (1962).

The tax credit envisioned in Section 901 is also available to U.S. companies operating outside the sphere of oil extraction and production, with the same purpose of avoiding the double taxation of United States taxpayers, whether such companies have domestic competition or not. Given this purpose, it is obvious that the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes.

In addition it cannot be said that parties in the position of appellant Field are arguably intended to be regulated by the provision granting tax credits; that is, appellant Field cannot be said to fall within the regulatory field of concern without stretching the concept of regulation to implausible limits.[82] Therefore, we conclude that the interests being asserted by Appellant Field as a competitor are not the interests arguably intended to be protected by the tax credit provision of section 901 which is the statutory basis for the challenge in this case. The congruence between the purpose of the statute (to prevent the double taxation of particular parties) and the interests asserted by appellant (competitive interest in fairness) is not sufficient to invoke the federal judicial power.[83]

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[82] See text and notes at notes 86 to 89, *infra*. Appellant is not directly regulated by the rulings being challenged in this case. Rather, a more appropriate description is that he operates in an industry which is regulated by the rulings but does not operate in that sphere of the industry which is the object of the regulation.

[83] *Cf.* cases cited at notes 48-50, supra; in these cases the congruence between the purpose of the statute (to legislate against competition generally) and the asserted interests (particular *types* of competition) was sufficient to satisfy the "arguable" terminology of the zone test.

We find it significant, as we noted earlier,[54] that appellants do not in their submissions to us attempt to persuade the court that appellant Field's asserted competitive interests fall within the zone of interests relevant to Section 901. Rather, appellants rely entirely on other provisions of the Code to argue that the zone sandard has been satisfied.[55] We have rejected this approach and put forth our reasons for so doing in part II.B.2(b), *supra*. This failure to address the issue of the zone standard as it relates to the statutory provision being challenged suggests that a convincing argument in this regard is lacking. Perhaps the most appropriate way in which we can emphasize the strength of our decision to deny standing on the basis of the zone standard is to sketch out the arguments which would need to be made in order to satisfy the zone standard in this context.

The argument that appellant Field's interests fall within the relevant zone of Section 901 rests on the premise that Section 901 can arguably be read not only as a decision to grant a tax credit to those who have paid foreign income taxes but also as a decision *not* to grant a tax credit to those who have made other sorts of payments, such as royalties, to foreign governments.[56] Under this "reverse zone of interest" analysis, competitors such as appellant Field could argue that they fall within the zone protected by the negative implication of the statutory provision.

We cannot accept this "reverse zone of interest analysis" which would extend standing to all those who may

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[54] *See* note 67, *supra*.

[55] *See* note 68, *supra*.

[56] This seems to rest on the misapprehension that the statute is directed exclusively at the tax scheme and problems of the petroleum industry, which we pointed out above was not so.

be able to allege injury because they were *not* regulated or protected by a particular statutory provision. Such an approach would render the zone standard meaningless. Although the text is a generous one, the terms "arguable" and "zone" are subject to definition in the context of particular factual situations such as presented in this case. To define the terms by reference to what they do not mean in these factual settings is clearly inappropriate.

There is one further argument concerning the zone of interests surrounding Section 901 which deserves mention. It can be argued that the decision to grant the international companies a tax credit has competitive *consequences* for parties such as appellant Field which bring him within the relevant zone. That is, since the challenged rulings have an *impact* on appellant Field in his capacity as an oil producer, he must therefore fall within the intended zone of Section 901. Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact on appellant Field. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to these concepts does not aid greatly in determining whether a protected interest exists, but rather serve as part of the vocabulary in defining the relationship between an alleged injury and an asserted interest.

Thus, *consequences* and *forms of impact* do play an important role in the law of standing; these concepts are relevant in determining whether there has been *injury in fact*. So, we have not ignored the competitive consequences and impact of the challenged rulings on appellant Field; we have taken these into account in determining that appellant has suffered competitive injury

in fact. A standing determination, such as the one involved with appellant Field as a competitor, involves separate stages of analysis;[87] we cannot simply transfer the analytical concepts employed in one stage (injury in fact) to the other stages of analysis dealing with prudential limitations. We cannot define the zone of interests as being the equivalent in every case of the "zone of impact" or the "zone of consequences." To do so would establish a standing doctrine based solely on the existence of harm to a party; it is clear that, under current Supreme Court doctrine which we are obliged to apply, such a result is unacceptable[88] as contrary to the stated purposes of the doctrine.[89]

In summary, we cannot look to a "reverse zone of interests" or to the consequences and impact of the challenged agency action to define a zone within which appellant Field's competitive interests fall. Rather, we must make our decision as to whether the party before us is an intended beneficiary of the statutory provision on the basis of the interests we believe Congress arguably intended to regulate or protect in the legislation. We cannot conclude that Congress arguably intended to regulate or protect the competitive interests of appellant Field in Section 901. The existence of competitive ramifications flowing from the challenged agency action is not sufficient evidence to infer that Congress arguably intended to protect or regulate competitive interests. The arguments to the contrary fail for the reasons cited above. Without a clearer indication from Congress from which could be constructed a plausible argument that the competitive interests are "arguably" to be regulated or protected, we cannot as a prudential matter make the

[87] *See Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[88] *Id.*

[89] *See* notes 59 and 60, *supra.*

federal courts available as a forum for third-party challenges to IRS action such as the one presented here.[90]

Conclusion

We recognize that as the result of our decision in this case it is likely that the revenue rulings at issue in the case may go unchallenged in federal court due to the lack of a proper party to sue. This eventuality does not, however, operate in favor of granting standing to the parties in this case.[91] The standing doctrine should not be manipulated to guarantee that there is a party to bring any action in court that some persons may think desirable to have adjudicated. Since we cannot conclude that appellants have standing under the current framework of analysis provided by the Supreme Court, the order of the District Court in this case is

Affirmed.

[90] A similar challenge to an IRS ruling was made in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Indeed, this case was held in abeyance by order of this court to await guidance from the Supreme Court in this area. In *Simon*, however, the Court denied standing on grounds not relevant to this case.

The Court in *Simon* explicitly chose "not to reach the question of whether a third party ever may challenge IRS treatment of another . . . ." 426 U.S. at 37. The appellee in this case has urged us to adopt such a blanket prohibition (Brief for Appellees at 37-43), but we, too, decline to speak to this issue.

[91] *See* note 20, *supra.*

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1782

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL., APPELLANTS

v.

MICHAEL BLUMENTHAL, SECRETARY OF TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-1081)

Argued October 20, 1976

Decided September 15, 1977

Thomas J. Bacas, with whom *Paul S. Quinn* was on the brief, for appellants.

Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Attorney, and *Ann B. Durney*, Attorney, Tax Division, Department of Justice, were on the brief, for appellees.

Before BAZELON, *Chief Judge*, MCGOWAN and ROBB, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MCGOWAN.

Dissenting opinion filed by *Chief Judge* BAZELON.*

MCGOWAN, *Circuit Judge*: This is an appeal from the District Court's dismissal of a complaint challenging the administration of the federal tax laws, not in relation to the tax liabilities of plaintiffs-appellants, but as to third parties not before the court. It thus presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon v. Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not "imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." Because *Eastern Kentucky*—an obviously relevant case—was pending before the Supreme Court at the time this appeal was first scheduled for oral argument, we deferred our consideration to await the Supreme Court's outcome. We now hold, by reference to the Supreme Court's disposition of *Eastern Kentucky*, that there was a fatal want of standing here; and we affirm the District Court's judgment for that reason.

I

Appellants, the American Society of Travel Agents (ASTA) and several individual travel agencies, complain

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* The dissenting opinion filed by Chief Judge Bazelon in this case is also to be filed as a dissent to No. 75-1304, *Tax Analysts and Advocates v. Blumenthal* (D.C. Cir., June 15, 1977).

of the failure of the federal tax authorities to assess taxes upon certain income received by the American Jewish Congress (AJC) and other organizations enjoying tax exemptions under § 501(c)(3) of the Internal Revenue Code.[1] In particular, they object to the tax-exempt treatment accorded to income derived from the operation of travel programs by § 501(c)(3) organizations. Appellants assert that such income should be taxed as so-called unrelated business income, *i.e.*, income obtained from a business the conduct of which is "not substantially related . . . to the exercise of performance . . . [of the] purpose or function constituting the basis" for an organization's § 501 exemption. *See* I.R.C. § 513(a). Alternatively, appellants contend that the AJC and other exempt organizations have become so heavily involved in the travel business that their § 501(c)(3) exemptions should be eliminated altogether.

By memorandum order, the District Court decided that neither count of appellants' complaint stated a claim upon which relief could be granted. 36 A.F.T.R.2d 75-

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[1] I.R.C. § 501(c)(3) (as amended, 1976) contains the following list of exempt organizations:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any any political campaign on behalf of any candidate for public office.

5142 (D.D.C. May 23, 1975). It observed that allegations like those raised by plaintiffs would necessitate "careful consideration of the particular facts and circumstances of each case." Unwilling to embark upon such an enterprise, the court declared that its jurisdiction could "not be invoked to undertake continuing supervision of IRS's administration of the Internal Revenue Code."

The District Court's reluctance to become embroiled, at the instance of taxpayers not directly involved, in the intricacies of tax law enforcement is both understandable and far from irrational in terms of jurisictional principles. However, we believe that, looking to the Supreme Court's opinion in *Eastern Kentucky*, dismissal of appellants' action should be accomplished by resolution of the preliminary question of standing. We conclude that appellants have failed to demonstrate any actual injury resulting from appellees' administration, with respect to third parties, of the statutory provisions governing tax-exempt organizations. We find that appellants here, like the complainants in *Eastern Kentucky*, "have failed to carry [the] burden" of establishing "that, in fact, the asserted injury was the consequence of defendants' actions, or that prospective relief will remove the harm." 426 U.S. at 45, quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

II

Appellants' basic grievance may be simply stated. Private travel agents earn their livelihood, primarily on a commission basis, through the sale of transportation and travel-related services in both domestic and foreign markets. One especially common function performed by travel agents is the arrangement of so-called tour packages, consisting of transportation, accommodations, meals, and a variety of other features. Such packages are sold together

at one price, a portion of which the agent retains as a commission.

Appellants allege that, in recent years, a number of tax-exempt organizations, including the AJC, have become increasingly involved in preparing tour packages and offering such packages to their members. Appellants further allege that the tax-exempt status of these organizations has enabled them to sell tour packages at prices lower than those which private travel agents must charge in order to earn a reasonable profit. Thus, so it is said, the AJC and other unspecified organizations have improperly used their tax exemptions to obtain an unfair competitive advantage in the sale of tour packages.

Operation of an extensive travel program is, in appellants' view, substantially unrelated to the religious, charitable, scientific, or educational purposes which justify many § 501(c)(3) exemptions, including that enjoyed by the AJC. Consequently, appellants urge that income from such a travel program should be subjected to the same tax treatment accorded to income earned by ordinary ASTA members. Somewhat less vigorously, appellants maintain that if the § 501(c)(3) organizations at issue conduct travel businesses of significant size, then those organizations are no longer operated "exclusively" for religious, charitable, scientific, or educational purposes, and thereby forfeit their § 501(c)(3) exemptions.

We do not reach the merits, because we believe appellants have not alleged any judicially cognizable "injury in fact," and thus have failed to establish their standing to bring this suit. "Injury in fact" has long been regarded as the foremost standing prerequisite, and the only one of constitutional dimension. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 686-89 & n. 14 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); and *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968). Under Article III of the Constitution, federal courts are limited to

the adjudication of cases and controversies. In order to guarantee the adversarial litigation posture demanded by this constitutional language, plaintiffs seeking to invoke federal court jurisdiction have been required to demonstrate that they have suffered some actual injury attributable to defendants.

Here, appellants claim to have been injured by appellees' improper administration of the Internal Revenue Code, and seek injunctive relief. However, appellants have not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury. Appellants point to no prospective customers who spurned the services of ASTA members because of appellees' allegedly inequitable tax treatment of § 501(c)(3) organizations. Nor do appellants identify tour package purchasers who in fact patronized the AJC or some other tax-exempt organization, but who might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations. Instead, appellants complain in more abstract terms, alleging injury arising from appellees' creation of an unfair competitive atmosphere, and seeking relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy. We regard this sort of injury claim as too speculative to support standing under the circumstances presented here.

We conceive that this disposition is not only sustained, but also largely mandated, by *Eastern Kentucky*. In that case, several indigents and organizations composed of indigents attacked a 1969 Revenue Ruling which revised the criteria under which non-profit hospitals might qualify for tax-exempt status as charitable institutions. In particular, the challenged ruling eliminated the requirement contained in a 1956 ruling to the effect that a non-profit hospital desirous of charitable classification "must

be operated to the extent of its financial ability for those not able to pay for the services rendered." Deletion of this language, argued the *Eastern Kentucky* plaintiffs, was directly responsible for several refusals by tax-exempt hospitals to provide needed services to individuals unable to pay a deposit or advance fee. Plaintiffs further alleged that similar refusals could be expected in the future if the offending Revenue Ruling was not changed.

As indicated above, the Supreme Court held that "[s]peculative inferences are necessary to connect [plaintiffs'] injury to the challenged actions . . .," and "[m]oreover, the complaint suggests no substantial likelihood that victory in this suit would result" in receipt of the hospital treatment desired. 426 U.S. at 45-46. The Court explained its conclusion by commenting upon what it perceived as the tenuous connection between the injury suffered and the relief sought by plaintiffs:

> [I]t does not follow . . . that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.
>
> It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial

> drain of an increase in the level of uncompensated services.[2]

Id. at 42-43.

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[2] Justice Powell's opinion for the Court made clear that the finding of a standing deficiency in *Eastern Kentucky* rested upon a constitutional foundation.

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.
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> * * * *
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> The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.
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> * * * *
>
> The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members.
>
> * * * *
>
> [T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant . . . .

Id. at 38-41 (footnotes omitted).

In a recent case decided by another panel of this court, inquiries relating to causation and redressability of an alleged injury are characterized as "prudential limitations." Tax Analysts and Advocates v. Blumenthal, No. 75-1304, slip op. at 11-12 (D.C. Cir. June 15, 1977); and *see also* Harrington v. Bush, No. 75-1862, slip op. at 28 n. 68 (D.C. Cir. Feb. 18, 1977), where such inquiries are portrayed as being separate and apart from the "constitutional threshold of injury-in-fact." The implication of these statements is that, although

ASTA's complaint in the appeal before us reveals inadequacies closely comparable to those which afflicted the pleadings filed by the indigents and indigent organizations in *Eastern Kentucky*. Appellants here must rely solely on speculation in their attempt to assert that their business or profits would improve in the event that appellees began to tax the travel-related income of § 501(c)(3) organizations. Appellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought.

As appellees argue in their supplemental memorandum, the lower cost of the tour packages offered by the AJC and other tax-exempt organizations may well be attributable at least in significant part to the use of volunteer labor or the willingness to accept lower profits than would commercial travel agents. Moreover, even if appellants were to prevail in this suit, members of § 501(c)(3) organizations might for a variety of reasons continue to prefer the travel programs operated by their own organizations. Alternately, such organizations might shift to tour packages whose religious or educational orientation would be more readily apparent. A third possibility is that travel by members of § 501(c)(3) organizations would simply decline.

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considerations of causation or redressability may conceivably operate to deprive particular plaintiffs of standing, such factors can in no event rise to the level of constitutional significance. Justice Powell's words in *Eastern Kentucky*, especially the passages quoted above, are at odds with this approach. Causation and redressability, far from being prudential matters to be evaluated *seriatim* only after constitutional standing has been established, are part and parcel of the "injury in fact" requirement arising from the "case or controversy" language in Article III. Causation and redressability thus represent not additional independent standing hurdles which prospective litigants must clear, but rather identifiable aspects of the "injury in fact" test which has long been recognized as the primary standing criterion in the federal courts.

If any of these consequences, or some combination of them, ensued from a decision favorable to appellants, private travel agents would enjoy no gain whatever from their successful litigation. This is precisely the sort of situation in which the Supreme Court failed to find standing in *Eastern Kentucky*.[3]

By emphasizing their asserted competitor status, appellants seek to distinguish *Eastern Kentucky*. Appellants contend that, as competitors of the AJC and certain other § 501(c)(3) organizations, they are entitled to protest tax treatment of such organizations in federal court.[4]

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[3] Although Justice Stewart's concurring statement in *Eastern Kentucky* dramatically denotes the special problems attendant upon the establishment of standing in the tax cases, under the circumstances of this case we find, as did the *Eastern Kentucky* majority, no need to reach "the question of whether a third party ever may challenge IRS treatment of another." 426 U.S. at 37. The conventional "injury in fact" prerequisite was simply not met by appellants in the record before us.

[4] Appellants also rely on their competitor status to establish that they are within the "zone of interests to be protected or regulated by" the relevant Internal Revenue Code provisions. The so-called "zone of interests" test stems from the Supreme Court's companion opinions in Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970) and Barlow v. Collins, 397 U.S. 159, 164-65 (1970). As the Court observed in *Eastern Kentucky*, the "zone of interests" test presents "a second, nonconstitutional standing requirement." 426 U.S. at 39 n.19. In an effort to demonstrate that the "unrelated business" concept was incorporated into the Code in order to protect competitors of tax-exempt organizations, appellants point to both the legislative history of I.R.C. § 513 and the regulations promulgated regarding that section. *See, e.g.*, H.R. REP. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. REP. No. 2375, 81st Cong., 2d Sess. 27-31 (1950); and 26 C.F.R. § 1.513-1(b) (1976). Given our disposition of this case under the "injury in fact" rubric, we need not address appellants' "zone of interests" argument.

For support of their position, appellants rely heavily on *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that private competitors had standing to challenge a ruling by the Comptroller of the Currency which allowed national banks to provide data processing services to other banks and bank customers. Appellants emphasize that the Supreme Court has, in its *Eastern Kentucky* opinion, recently reaffirmed the vitality of the *Data Processing* decision. *See* 426 U.S. at 45 n. 25.

Our response is threefold. First, the rather cryptic phrasing of *Data Processing* does not clearly define the contours of competitor standing as conceived by the Supreme Court. The opinion by Justice Douglas for the Court provides little guidance as to the precise nature of the requirements which must be satisfied before competitor standing can be sustained.[5]

Secondly, and more significantly, *Data Processing* was not a tax case. Whatever may be the impact of competitor standing when ordinary administrative action is

[5] Two examples may be cited. The first involves the identity of the parties who must be sued by a litigant alleging competitor standing. In *Data Processing*, one of the respondents was American National Bank & Trust Company, a national bank which was offering data processing services pursuant to the controverted ruling by the Comptroller of the Currency. Justice Douglas's opinion does not disclose whether a successful claim of competitor standing necessitates naming one or more specific competitors as party oponents. Here, only the Secretary of the Treasury and the Commissioner of Internal Revenue were named as defendants. No organizations holding § 501(c)(3) tax exemptions were made parties. We note that in *Eastern Kentucky*, Justice Powell stressed the fact that no tax-exempt hospital was a defendant. *See* 426 U.S. at 41. Also omitted from the *Data Processing* opinion was all discussion of the chain of causation connecting the challenged administrative action to the injury allegedly suffered by competitors of regulated enterprises. That chain was patently much shorter and more direct in *Data Processing* than it is in this case.

at issue, we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor.

Finally, § 501(c)(3) organizations occupy a different posture with respect to the sale of tour packages than did the national banks with respect to the provision of data processing services. Here, the AJC and other such groups will clearly remain free to pursue their travel businesses, however the tax status is finally resolved. By contrast, in *Data Processing*, if the Comptroller of the Currency's ruling had been overturned on judicial review, the offering of data processing services by national banks would have been *illegal*, and petitioners undoubtedly would have faced no further competition from that source, absent statutory revision.

For all these reasons, we do not believe that the *Data Processing* decision controls the standing issue in the present litigation.[6] Since we are convinced that the *Eastern Kentucky* analysis of standing is the one we are

[6] In *Tax Analysts, supra* note 2, a panel of this court recently found economic injury in fact, adequate to meet the Article III test of standing. Appellant in that case was the owner of a small domestic oil well. Rightly or wrongly, he characterized himself as a competitor of the major oil companies producing and importing oil from abroad. He claimed to have suffered economic harm because the IRS had acquiesced in the tax credit treatment of certain sums paid by large oil companies to foreign governments. Appellant in *Tax Analysts* asserted that these sums represented foreign excise taxes or royalties, not foreign income taxes, and that therefore, they should be treated as deductible business expenses, not tax credits. Having found such allegations sufficient to establish injury in fact, the *Tax Analysts* panel then addressed the prudential "zone of interests" test, and found that the court house door was barred on that score. By reason of this latter finding, the panel did not think it necessary to pursue what it termed the "two additional prudential limitations relating to causation and redressability of the grievance. . . ." Slip op. at 11-12 (footnote omitted); and see note 2 *supra*.

bound to apply in this case, and that under it appellants lacked standing to maintain this suit, the judgment of dismissal is affirmed.[7]

It is so ordered.

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[7] The dissent observes of the foregoing opinion that "it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury." The word "constructs" is hardly an apt characterization of the majority's effort, in purpose and effect, to follow as faithfully as possible the Supreme Court's disposition of *Eastern Kentucky*—the case which, prior to that disposition, all members of the panel appeared to regard as almost certainly controlling.

It would thus seem that the dissent's quarrel is essentially with the approach taken by the Supreme Court majority in *Eastern Kentucky*, and not with anything the panel majority has itself contrived. The dissent asserts that that approach is an impolitic and unwarrantable return to the rigors of common law pleading, and one that is incompatible with a rational determination of assessibility to the federal courts. Although in this instance the dissent purports to see distinctions which enable it to assert that *Eastern Kentucky* was rightly denied by the Supreme Court, it is manifest that this is not an undertaking it finds either necessary or congenial. As is usually the case in such circumstances, the differentiations here made in terms of economic probabilities are less than conclusive.

It is no disrespect to the Supreme Court to say that the concept of standing appears to be undergoing development. *Warth v. Seldin, supra*, and *Eastern Kentucky*, with their new emphasis upon causation and redressibility, indicate that at least a majority of the Court is no longer content with a constitutional concept of injury in fact limited to an assurance that the interest asserted will guarantee an effective adversarial presentation. Causation and redressability have now explicitly been comprehended within that concept. Whether this is only a tightening up of pleading requirements, or whether it is a way station on the road to a holding of nonjusticiability in certain classes of litigation, neither we nor the dissent can say. In such circumstances it is surely the function of an intermediate appellate court to be guided by standing requirements as they are currently articulated by the Supreme Court in closely comparable contexts.

BAZELON, *Chief Judge, dissenting* in No. 75-1304, *Tax Analysts and Advocates v. Blumenthal*, and in No. 75-1782, *American Society of Travel Agents, Inc. v. Blumenthal*: Two panels of the Court hold, for partially inconsistent reasons, that a taxpayer suffering competitive injury lacks standing to challenge tax rulings applicable to a third party. Because I disagree with the reasoning of both panels, I must respectfully dissent.

I have decided to write a common dissent on both decisions because I believe that, although each panel develops a different aspect of standing doctrine, both are in fact responding to a common but implicit apprehension of taxpayer standing.[1] I share that apprehension. The spectre of the Internal Revenue Service (IRS) defending a multiplicity of suits challenging the tax liabilities of third parties is not a happy one.[2] Taxes and courts are a

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[1] The majority opinion in No. 75-1782, American Society of Travel Agents, Inc. v. Blumenthal, states with admirable candor that the case "presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon* v. *Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not 'imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.'" Maj. op. at 2. Although the opinion does not directly address this question, it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury. The majority opinion in No. 75-1304, Tax Analysts and Advocates v. Blumenthal, explicitly declines to address the issue of "whether a third party ever made challenge IRS treatment of another." Maj. op. at 27 n.90. However, the discussion of the "zone of interests" test in the opinion seems designed, "as a prudential matter," *id.* at 26, to eliminate such challenges from a federal forum.

[2] On the other hand, it must be recognized that the Code is a statutory system designed delicately to balance the relationships among economic entities. To permit tax liability to be challenged only by the taxpayer himself is in effect to permit

volatile political combination; our jurisdiction in this area has for that reason been circumscribed by statute.[3] But whether a federal forum should be closed to such suits is a profound and complicated issue, and at base one that should be decided by Congress. At present Congress has decided that we do have jurisdiction to hear cases such as those presently before us,[4] and we are obligated to exercise this statutory jurisdiction.

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the IRS virtually unfettered discretion in adjusting these economic interrelationships. The spectre of such unreviewable discretion, especially when, as is alleged in these two cases, it is exercised in contradiction to the commands of Congress, is also discomforting.

[3] 26 U.S.C. § 7421(a), for example, provides that, except in certain exceptional circumstances, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The purpose of the statute is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing and Navigation Co., Inc., 370 U.S. 1, 7 (1962). Our jurisdiction is similarly limited in the area of federal taxes by the Declaratory Judgment Act, which authorizes courts of the United States to issue declaratory judgments "except with respect to Federal taxes . . . ." 28 U.S.C. § 2201.

[4] In Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 36-37 (1976), the Supreme Court specifically left open the question of whether statutory or immunity bars would ever permit a third party to "challenge IRS treatment of another." This court has held, however, that since 26 U.S.C. § 7421(a) only forbids suits instigated "for the purpose of *restraining* the assessment or collection of any tax," (emphasis added), it does not bar suits seeking to compel the *collection* of taxes. Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). We have also held that the scope of the prohibition in the Declaratory Judgment Act, 28 U.S.C. § 2201, is "coterminous" with that of 26 U.S.C. § 7421(a), *id.* at 1284-85, and hence that in suits seeking to compel the collection of taxes we are authorized to provide declaratory relief.

Appellants have alleged circumstances that would have justified standing had they been seeking review of an ordinary administrative ruling. What concerns me most deeply about these decisions is that both deny appellants standing not on principles specifically applicable to taxpayers suits, but on the basis of general doctrines of the law of standing. The consequence is that general standing law is distorted to accommodate the purpose of shielding the IRS.

In No. 75-1782, *American Society of Travel Agents, Inc. v. Blumenthal*, appellants, numerous commercial travel agencies and the American Society of Travel Agents (ASTA), a non-profit corporation organized to represent the professional interests of travel agents, allege that certain organizations tax exempt under 26 U.S.C. § 501(c)(3),[5] and the American Jewish Congress (AJC) in particular, actually package and offer to the public large scale commercial travel programs. Appellants argue that such commercial activities are illegal in corporations exempt under § 501(c)(3),[6] and that

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[5] 26 U.S.C. § 501(c)(3) exempts from taxation

> [c]orporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[6] Complaint ¶¶ 22, 23.

appellants are injured by this illegality since tax-exempt organizations can offer travel programs more cheaply than tax-paying organizations.[7] They ask that the AJC and similar organizations be deprived of their tax-exempt status, or, in the alternative, that income from these commercial programs be taxed under 26 U.S.C. § 511 (a).[8] The majority holds that appellants fail to meet the Article III requirement of injury in fact. Because I believe that appellants have alleged ordinary competitive injury sufficient to meet the standards set out in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), I dissent from this holding.

In No. 75-1304, *Tax Analysts and Advocates v. Blumenthal*, the majority denies standing to appellant Tax Analysts and Advocates (TAA), a non-profit corporation organized for the purpose of promoting tax reform, and to appellant Thomas Field, a United States taxpayer and owner of the entire working interest in a currently producing oil well in Pennsylvania. Appellants seek to challenge published[9] and private[10] rulings by the IRS that taxes imposed by Saudi Arabia, Libya, Iran, Kuwait and Venezuela are "income" taxes, and thus can be credited against U.S. tax liability under 26 U.S.C.

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[7] *Id.* at ¶ 24.

[8] 26 U.S.C. § 511(a) imposes on corporations subject to § 501(c)(3) a tax on "unrelated business taxable income." "Unrelated business" is defined in § 513(a) to mean

> any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 . . . .

[9] *See* Revenue Ruling 55-296, 1955-1 Cum. Bull. 386; Revenue Ruling 68-552, 1968-2 Cum. Bull. 306.

[10] *See* Amended complaint ¶ 10, Joint Appendix (JA) at 41.

§ 901(b).[11] Appellants allege that these taxes are in fact either royalties or "excise, severance, or similar taxes not creditable under Section 901(b)."[12]

Appellant Field and appellant TAA as a representative of its tax-paying members, claim injury as taxpayers. They allege that the illegal IRS rulings cost the U.S. Treasury approximately $3,000,000,000 in 1974, and argue that this loss causes them to pay higher federal income taxes.[13] Appellant Field, in addition, claims that he is injured as a competitor of those oil companies who benefit from the illegal IRS rulings. Field alleges that since the prices charged by these companies for imported oil largely determine the market price for the uncontrolled crude oil of domestic independent producers, he receives a lower price for his oil than would be the case if such companies could only deduct these foreign taxes from their gross income rather than illegally credit them.[14] Moreover, since domestic producers can only deduct the royalties they pay to the land owners of their oil wells,[15] Field claims that investment in foreign oil production is relatively more profitable and attractive.

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[11] 26 U.S.C. § 901(b) permits a U.S. citizen or domestic corporation to receive a tax credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country . . . ."

[12] Amended Complaint ¶ 14, JA at 42.

[13] Amended Complaint at ¶¶ 14, 20, 21, JA at 42, 44.

[14] Amended Complaint at ¶ 18, JA at 43-44.

[15] Appellant Field pays a royalty of one-eighth of the proceeds of all oil produced from his well to the owners of the land on which the well is located. These royalties are expected to amount to $46.32 per year for the next five years. See the findings of the District Court, Tax Analysts and Advocates v. Simon, 390 F. Supp. 927, 929-30 (D.C.C. 1975).

Field alleges that the IRS rulings thus "depress the value of his operating interest in a domestic oil well." [16]

The majority denies standing to both Field and the TAA in their capacities as mere taxpayers.[17] Because as taxpayers appellants have not met the "nexus" text of *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968),[18] and have alleged only a "generalized grievance" the impact of which "is plainly undifferentiated and 'common to all members of the public . . .' *Ex parte Lévitt*, 302 U.S. 633, 634 (1937)," [19] I concur in that holding.[20]

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[16] Amended Complaint ¶ 19, JA at 44.

[17] The majority affirms the District Court's finding of no injury in fact and adopts its reasoning at 390 F. Supp. 932-38. Maj. op. at 4 n.10.

[18] *Flast* focused on the "logical nexus between the status asserted and the claim sought to be adjudicated." The decision held that there were two aspects to the nexus required to sustain taxpayer's standing. "First, the taxpayer must establish a logical link between [federal taxpayer] status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102.

[19] United States v. Richardson, 418 U.S. 166, 176-77 (1974).

[20] I do not agree, however, with the majority's conclusion that appellants have suffered no injury in fact. Maj. op. at 4 n.10. A generalized grievance is a grievance nonetheless. Since injury in fact is a constitutional prerequisite of standing, the taxpayer in *Flast* must have suffered such an injury. Nevertheless, the Supreme Court has held that as a prudential matter, a grievance "shared in substantially equal measure by all or a large class of citizens" should normally not "warrant exercise of jurisdiction." Warth v. Seldin, 422 U.S. 490, 499 (1975). Congress can, of course, "either expressly or by clear implication" override this prudential consideration. *Id.* at 501. Appellants, however, have pointed to no statute in which Congress has either expressly or implicitly authorized a right of action for generalized taxpayer grievances.

The majority also denies appellant Field standing. It concedes the Field has suffered injury in fact sufficient to meet Article III standards,[21] yet it finds that Field has failed the second of the standing tests enunciated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). It concludes that the interests Field seeks to protect are not "arguably within the zone of interests to be protected or regulated" by § 901(b). In reaching this conclusion the majority is forced to construe the "zone of interests" test in an unsupportable manner, capable of causing unforeseeable mischief in other areas of standing law. I dissent both from the majority's conclusion and from its construction.

I. Injury in Fact

Article III of the Constitution limits federal court jurisdiction to actual cases or controversies. The question of standing "focuses on the party seeking to get his complaint before a federal court," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), in order to determine if he "has made out a 'case or controversy' between himself and the defendant within the meaning of Act. III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Two aspects of the case and controversy standard are important for the law of standing. The first is that cases and controversies must be adversary; that is, they must be disputes over actual or threatened injuries. Thus standing exists "only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)." *Id.* at 499. Second, cases and controversies must "be presented in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Thus federal courts cannot, consistent with Article III, issue advisory opinions. *Id.* at 96-97.

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[21] Maj. op. at 12.

Standing requires that a plaintiff demonstrate "an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).[22] *Eastern Kentucky* makes clear that an injury capable of being redressed is one that can fairly "be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.[23]

It is, of course, settled law that in appropriate circumstances competitive injury constitutes sufficient injury in fact to fulfill Article III requirements.[24] This is acknowledged by the opinion in *Tax Analysts*.[25] In that case appellant Field owns the entire working interest in a Pennsylvania oil well. The well produces three barrels of crude oil per month at a price of $10.28 per barrel. Field's anticipated profits before taxes are approximately $203.76 per year.[26] He complains of economic injury because allegedly illegal IRS rulings have decreased the value of his well and the price he receives for his crude oil.

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[22] *See* United States v. Evans, 213 U.S. 297 (1909).

[23] Like the majority in *Travel Agents*, I disagree with the observation in *Tax Analysts* that "causation" and "redressability" are merely "prudential limitations" on standing. See *Tax Analysts* at 11-12; *Travel Agents* at 8 n.2.

[24] Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 (1974); Sierra Club v. Morton, 405 U.S. 727, 736-37 & n.11 (1972); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

[25] Maj. op. at 12.

[26] 390 F. Supp. at 929.

At first blush it is tempting to hold such economic injury, if it exists, to be *de minimis*. However, it is apparent that there can be no principled justification for such a holding, and the Supreme Court has held that any identifiable trifle of harm is enough to establish standing. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973). It is also tempting to hold that Field's injury is too speculative. While it is true that we cannot know with absolute certainty whether the elimination of the allegedly illegal IRS ruling would redress Field's competitive injury, he has set forth a cogent economic analysis that this would be the case. To require Field to allege facts that would prove the laws of economics would be ungainly, wasteful, and inconsistent with the philosophy of pleading of the Federal Rules of Civil Procedure. The modern conception of "notice pleading" [27] does "not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Requiring Field to allege all of the facts supportive of the chain of causation upon which his allegation of injury rests would return us to the unpredictable and fact-laden system of code pleading.[28]

Recognizing all this, the majority in *Tax Analysts* holds that Field "has suffered injury in fact in his capacity as a

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[27] Wright and Miller object to the term "notice pleading" and suggest instead "modern pleading" or "simplified pleading." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1202 (1969).

[28] *See id.*; 2A MOORE'S FEDERAL PRACTICE ¶¶ 8.12-8.13 (1975); CLARK, CODE PLEADING § 38 (1947); Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202, 203-05 (1957).

competitor." [29] I concur in this holding. And, so far as I can see, the competitive injury that ASTA and the other appellants in *Travel Agents* claim to have suffered is virtually indistinguishable. Yet the majority in that case holds that appellants have no standing because they have failed to demonstrate "any judicially cognizable 'injury in fact.' " [30]

The majority in *Travel Agents* holds, first, that the very existence of appellants' competitive injury is "too speculative to support standing" since they do not allege specific customers who would be gained if the AJC and similar organizations were to lose their tax-exempt status.[31] Second, the majority concludes that "[a]ppellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought." [32] If the tax-exempt status of the AJC or other tax-exempt organizations were eliminated, these organizations might still maintain lower prices because of "volunteer labor or the willingness to accept lower profits"; or members of these tax-exempt organizations might still prefer the travel programs of their own organizations even if more expensive; or such members might simply decide not to travel at all.[33]

With all due respect, such reasoning reveals that it is the majority, not the appellants, who is engaging in speculation. The economic basis of appellants' injury is straightforward, far more compelling even than that alleged by appellant Field in *Tax Analysts*. Appellants allege that because of the AJC's

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[29] Maj. op. at 12. The majority terms the government's arguments to the contrary "frivolous." *Id.* at 12 n.45.

[30] Maj. op. at 5.

[31] *Id.* at 6.

[32] *Id.* at 9.

[33] *Id.*

> tax-exempt status and the other privileges which flow from it, such as reduced-rate postage, the [AJC] and others are able to offer lower-cost travel programs than plaintiffs and other tax-paying travel agents. Plaintiffs allege and believe that numerous persons who would otherwise use plaintiffs' services and the services of other tax-paying travel agents are instead induced by the extensive mail solicitations and lower costs and take business to tax-exempt organizations.[34]

It is true, of course, that all claims of competitive injury are to some extent speculative, since they are predicated on the independent decisions of third parties; *i.e.*, customers. However economics is the science of predicting these economic decisions, and it is the stuff of the most elementary economic texts that if two firms are offering a similar product for different prices, the firm offering the lower price will draw away customers from its competitor. For us to fly in the face of this learning and require a plaintiff to *allege in his complaint* the names of specific customers who would be led to alter their consumption patterns, would be to exalt form over substance and to take a long, unfortunate step backwards into what Professor Moore has termed "the morass" of code pleading.[35] I know of no case, nor has one been cited by the majority, in which such allegations have been adjudged a necessary element in a complaint of competitive injury.[36]

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[34] Complaint ¶ 24.

[35] 2A MOORE'S FEDERAL PRACTICE ¶ 8.13 (1975). Stripped to its essentials, the majority's argument is that appellants have alleged conclusions rather than facts. However, under the philosophy of the Federal Rules, "it is immaterial whether a pleading states 'conclusions' or 'facts' as long as fair notice is given . . . ." *Id.*

[36] *See* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1st Cir. 1977); Concerned

The majority's reasoning, in fact, is flatly contradictory to *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). In that case plaintiffs complained of competitive injury because of an allegedly illegal regulation of the Comptroller of the Currency permitting national banks to establish and operate collective investment funds. The Supreme Court upheld the standing of the plaintiffs, *id.* at 620-21, even though their allegations of injury were no more specific that those of the appellants in this case. Plaintiffs alleged merely that they would

> suffer present and continuing serious and irreparable injury as a direct result of the illegal activity authorized by the Comptroller's challenged regulations and particularly as a result of the Bank's proposed illegal activity which was approved by the Comptroller under such regulations. This illegal activity

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Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33 (3d Cir. 1976).

It is unclear to me exactly what facts the majority would require to be alleged. Surely an affidavit from a tour package purchaser swearing that *he would have patronized a commercial travel agency had its prices been competitive* would constitute the height of speculation. *See* American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 (1960), in which the Court concluded that trucking companies had standing under § 205(g) of the Interstate Commerce Act and § 10(a) of the Administrative Procedure Act to challenge the ICC's granting of a permit to a competitor to perform transportation services for appellee General Motors Corporation, *despite GM's statement in court that it would not do business with appellants.* The Court stated, "And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. The decision we believe to be controlling is . . . *Alton R. Co.* v. *United States*, 315 U.S. 15, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker." Id. at 17-18.

> will subject the Institute's mutual fund members to illegal competition, will deprive them of legitimate business, and will dilute, divert, and withdraw a substantial portion of the potential market for securities in mutual funds to the substantial and irreparable injury of such plaintiffs and the shareholders in such funds. This illegal activity will also subject the Institute's investment adviser and underwriter members, including the additional plaintiffs, to illegal competition and to loss of opportunities for profit in their trade and will dilute, divert and withdraw a substantial portion of the potential market for their services to the irreparable injury of such plaintiffs.[37]

The Supreme Court did not, as does the majority in this case, require plaintiffs to allege in their complaint facts sufficient to refute every possible anomaly of the marketplace such as the existence of voluntary labor or ideologically committed consumers. The Court assumed that the marketplace would function in a normal, predictable fashion,[38] for to assume otherwise would be to foreclose the

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[37] Complaint ¶ 18. *Investment Co. Institute v. Camp* was a consolidation of two cases, No. 61, Investment Co. Institute v. Camp, and No. 59, National Ass'n of Securities Dealers, Inc. v. SEC. The complaint quoted in text is from No. 61, the case in which the Supreme Court specifically upheld standing.

Just last year, this court accepted jurisdiction of a case in which plaintiffs had obtained standing on the basis of a complaint reading very much like the complaint in the instant case. Plaintiffs alleged competitive injury, yet named no specific customers who had been lost. This court not only accepted plaintiffs' standing, but also upheld the district court injunction because it was necessary to protect these plaintiffs from "further economic and competitive injury." Independent Bankers Ass'n v. Smith, 534 F.2d 921, 952 (D.C.Cir.), *cert. denied sub nom.* Bloom v. Independent Bankers Ass'n, 429 U.S. 862 (1976); Complaint ¶ 31.

[38] The assumption is a common one. For example, in cases under the Robinson-Patman Act, 15 U.S.C. § 13, "competitive injury may be inferred when one set of customers buys at sub-

very possibility of ever satisfactorily alleging a competitive injury. As the majority's opinion demonstrates, one might conjecture an indefinite number of such anomalies, some more plausible than others. For every anomaly invented, the plaintiffs' claim can be made to appear more "speculative." Standing under such access rules would virtually depend upon the imagination of the reviewing judge.

The majority argues that its conclusion is required by *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). I disagree. In *Eastern Kentucky*, plaintiffs alleged that a 1969 Revenue Ruling has "encouraged" hospitals to deny services to indigents.[39] Under the tax code, benefactors of institutions qualifying as "charitable" under § 501(c)(3) can deduct the amount of their donations. Plaintiffs alleged that the new Revenue Ruling, by permitting hospitals that offered only emergency room services to indigents to qualify for § 501(c)(3) status, "caused" the refusal of various hospitals to admit indigent plaintiffs. The premise of the plaintiffs' argument was that hospitals were so dependent upon deductible donations that they would perform whatever services were necessary to qualify for § 501(c)(3) status. That premise, as a logical or economic prediction, was clearly false: there

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stantially lower prices than other customers." Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). *See* FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948): "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." The injury, of course, may be inferred because merchants faced with higher prices and therefore higher costs must in turn charge their customers higher prices and thereby lose business and suffer competitive injury. This is precisely the chain of economic reasoning relied upon by appellants in *Travel Agents*.

[39] 426 U.S. at 42.

was no way of knowing in advance whether the increased income from charitable contributions would exceed the increased costs of providing additional services. The result, as the Supreme Court observed, would "vary from hospital to hospital." *Id.* at 43. Plaintiffs had thus failed to allege facts sufficient to predict whether the change in the Revenue Ruling would affect the behavior of those particular hospitals that had refused to admit the plaintiffs.

Eastern Kentucky applies to fundamentally different circumstances than those presented in *Travel Agents*. The injury alleged by ASTA and the other appellant travel agencies does not depend upon the discreet decisions of particular institutions or specific customers. Appellants allege a competitive injury, stemming from a systematic distortion of the marketplace. They claim that, because of illegal IRS rulings, their competitors pay no taxes and therefore have lower costs and charge lower prices. There is nothing hypothetical about this allegation: if we grant the relief appellants seek, the costs of their competitors would necessarily increase. The ultimate injury alleged is a loss of customers, and there is, of course, an implicit prediction in appellants' case that customers will, on the whole, tend to buy similar items at the lowest possible price. The majority can refer to this injury as "abstract" and to this prediction as "speculative," but these are abstractions and speculations that every businessman must confront every day.[40] The majority's corrosive skepti-

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[40] Article III, of course, does not require *absolute certainty* that prospective relief will redress the alleged harm. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049, -6050, -6059, slip op. at 1098 (2d Cir. 23 December 1976). This court, for example, has held that an unsuccessful bidder for a government contract has standing to challenge the validity of the awarding of the contract, even though the plaintiff has

cism would altogether eliminate competitive injury as a grounds for standing."[41] That would in fact be contrary to the teaching of *Eastern Kentucky*, since the decision explicitly reaffirmed *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). Standing was appropriate in *Data Processing*, the Court said, because in that case the complaint had "alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action." 426 U.S. at 45 n.25.

"no right . . . *to have the contract awarded to it* in the event the district court finds illegality in the award . . . ." (Emphasis added.) Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970). *See* Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); Hayes International Corp. v. McLucas, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); William F. Wilke, Inc. v. Department of Army, 485 F.2d 180 (4th Cir. 1973); Merriam v. Kunzig, 476 F.2d 1233 (3d Cir.), *cert. denied sub nom.* Gateway Center Corp. v. Merriam, 414 U.S. 911 (1973).

[41] I share, of course, the majority's concern "to follow as faithfully as possible" *Eastern Kentucky*. Maj. op. at 13 n.7. We differ in our reading of that case, not in our respect for the precedents of the Supreme Court. The majority seems to have taken from *Eastern Kentucky* the concepts of "causation," "redressability," and "speculation," without, in my view, adequate appreciation of the malleableness—not to say vagueness—of these ideas. They are the kind of standards that acquire meaningful content only in application to particular circumstances. *See* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 681-88 (1977). The claim of competitive injury was not addressed in *Eastern Kentucky*, and the majority's result is therefore not required by that case. If this area of the law, confused because "undergoing development," maj. op. at 13 n.7, is to be clarified, it will not be through the abstract application of general principles, but through a detailed discussion of the pertinent differences and similarities. I cannot believe that this is an inappropriate function for "an intermediate appellate court." *Id.*

In *Travel Agents* appellants also allege "injurious competition" that is "directly traceable to the action of the defendant federal official." The majority attempts to distinguish *Data Processing* by arguing that the relief requested in that case was the total elimination of the allegedly illegal competition, whereas in *Travel Agents* "the AJC and other such groups will clearly remain free to pursue their travel businesses, however their tax status is finally resolved."[42] This distinction, however, goes only to the extent of the injury suffered, not to its speculative or hypothetical nature. And so long as appellants have alleged any "identifiable trifle" of an injury, they should be granted standing. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Tax Analysts and Advocates v. Blumenthal*, No. 75-1304, slip op. at 12 (D.C. Cir. 15 June 1977). Because I believe that *Data Processing* controls this case, I would hold that appellants have alleged injury in fact sufficient to meet the prerequisites of Article III.

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[42] Maj. op. at 12. The majority offers two additional reasons for distinguishing *Data Processing*. The first is that the case did "not clearly define the contours of competitor standing as conceived by the Supreme Court." The majority states, for example, that it is unclear whether "a successful claim of competitor standing necessitates naming one or more specific competitors as party opponents." *Id.* at 11 n.5. But surely this doubt should be laid to rest by the complaint in case No. 61 of Investment Co. Institute v. Camp, 401 U.S. 617 (1971), *see* note 37 *supra*, in which, as in the instant case, only the relevant federal official was made a party opponent and no competitors were named defendants.

The majority also attempts to distinguish *Data Processing* on the grounds that it "was not a tax case." Maj. op. at 11. While I believe this rather cryptic distinction goes to the heart of the majority's holding, it cannot without further elaboration be the basis of a principled distinction. What is needed is a full discussion of the difference between challenges of the rulings of the IRS and challenges of the rulings of other administrative agencies.

II. Zone of Interests

Data Processing announced two tests for standing: A petitioner must allege injury in fact, and he must allege that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The majority in *Tax Analysts*, following a different approach from that in *Travel Agents*, finds that appellant Field has suffered injury in fact, but concludes that he must fail the zone test because he is not arguably within the zone of interests protected or regulated by the provisions of IRS § 901(b),[43] the foreign tax credit.

As the majority in *Tax Analysts* candidly admits,[44] the ambiguities and analytic deficiencies of the zone test have in recent years suffered scathing criticism.[45] In order to reach its conclusion, the majority is forced to undertake an extensive reevaluation of the purposes and operation of the zone test. In my opinion not only does the majority reach an incorrect conclusion in the instant case, but its analysis only further confuses an already unfortunately unsettled area of the law.

A. *Defining the Zone of Interests*

The majority begins with the premise that the zone test must be "based on discerned Congressional purpose." [46] It concludes that the function of the zone test is to allow

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[43] *See* note 11 *supra*.

[44] Maj. op. at 13.

[45] *See, e.g.*, K.C. Davis, Administrative Law Treatise (Supp. 1970) § 22.00-3; Scott, *Standing in the Supreme Court —A Functional Analysis*, 86 Harv. L. Rev. 645, 664 n.88 (1973).

[46] Maj. op. at 16.

"courts to define those instances when it believes the exercise of its power at the instigation of the particular party is not congruent with the mandate of the legislative branch in a particular subject area." [47]

I agree with the majority's premise. The real question, however, is how "the mandate of the legislative branch" is to be determined. In some cases congressional intent will be manifest. In *Travel Agents*, for example, the legislative history of sections 511-513 of the Code [48] clearly indicates that Congress intended to eliminate the unfair competition that results when tax-exempt organizations compete with tax-paying enterprises. Both House and Senate Committee reports state that "[t]he problem at which the tax on unrelated business income is directed is primarily unfair competition." H. R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 28 (1950).[49] There is no doubt, therefore, that appellants would have satisfied the zone test.

In other cases, however, the legislative mandate will be silent or ambiguous with respect to the interests of a "particular party." In such cases it is necessary to develop rules for the constructive interpretation of congressional purpose. Decisions of the Supreme Court that have enunciated and applied the zone test are the most authoritative source of such rules. These decisions indicate that congressional intent must be construed to include within the zone of interests to be protected or regulated

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[47] *Id.* at 15.

[48] *See* notes 5 and 8 *supra*.

[49] Treasury regulations recognize that the primary purpose of the unrelated business income tax "was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the non-exempt business endeavors with which they compete . . . ." 26 C.F.R. § 1.513-1(b).

by a statute those interests upon which the statute will have a readily forseeable impact.

In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), for example, plaintiff travel agents challenged as contrary to the Bank Service Corporation Act a ruling of the Comptroller of the Currency authorizing national banks to provide travel services for their customers. Plaintiffs themselves were clearly not the intended beneficiaries of the Act. There were unchallenged findings in the court below that the limitations on banking activity imposed by the Act "were for the purpose of insuring the stability, liquidity, and safety of the banks" and that Congress was unconcerned "with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents." 408 F.2d 1147, 1151 (1st Cir. 1969). Nevertheless the Supreme Court concluded that the interests asserted by plaintiffs were arguably within the zone of interests protected by the Act. The *only* connection between plaintiffs' interests and the Act was that "[w]hen national banks begin to provide travel services for their customers, they compete with travel agents . . . ." 400 U.S. at 46.

Investment Co. Institute v. Camp, 401 U.S. 617 (1971), teaches a similar lesson. In that case plaintiff investment companies challenged a regulation of the Comptroller authorizing national banks to establish and operate collective investment funds. Plaintiffs alleged that the regulation violated provisions of the Glass-Steagall Banking Act. Despite unchallenged evidence that "neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for the interests of the petitioners and others like them in freedom from competition," 401 U.S. at 640 (Harlan, J., dissenting),[50] the court held that plaintiffs satisfied

[50] The Court even appeared to concede this point. 401 U.S. at 634. *See* Scott, *supra* note 45, at 665-66.

the requirements of the zone test. Again, the readily forseeable impact of the statute on plaintiffs' interests was their only connection to the legislation.

These decisions, then, stand for the proposition that, in the absence of manifest congressional intent to the contrary, the zone of interests arguably protected or regulated by a statute should at a minimum include those interests upon which the statute has a readily foreseeable impact.[51] Plaintiffs asserting such interests should have standing under the zone test.

The majority, however, rejects this conclusion, arguing that "the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests."[52] The majority reasons that defining "the zone of interests as being the equivalent in every case of the 'zone of impact' or the 'zone of consequences' . . . would establish a standing doctrine based solely on the existence of harm to a party . . . ."[53] But this reasoning is clearly faulty: a statute's zone of *foreseeable* impact or consequences would not encompass every incidence of *actual* impact. And, more importantly, the majority's conclusion is flatly contradictory to the guidance of the Supreme Court.

I sense yet another, implicit reason underlying the majority's rejection of the liberal standards of *Arnold Tours* and *Investment Co. Institute*. Although the majority acknowledges that the zone test is meant to be

[51] This formulation is consistent with the only case I have found to give extensive consideration to this question, Cotovsky-Kaplan Physical Therapy Ass'n, Ltd. v. United States, 507 F.2d 1363, 1366-67 (7th Cir. 1975) (per Stevens, J.).

[52] Maj. op. at 25.

[53] *Id.* at 26.

"a quite generous standard," [54] it nevertheless argues that the test implements that aspect of standing doctrine designed to define "the proper—and properly limited—role of the courts in a democratic society." [55] This function of standing law, however, has been used to justify the *restriction* of access to federal courts.

Even if the majority has correctly identified the appropriate function of the zone test, it does not follow that the test must be interpreted in a restrictive fashion. The Supreme Court decisions that have used standing doctrine to define the role of the courts in a democracy have been in the context of constitutional challenges to government action.[56] Such challenges raise difficult issues about the proper judicial role because they require a non-elected judiciary on its own authority to pass on the actions of the democratic branches of government. These issues are not raised in so dramatic a fashion by the zone test, however, at least in its statutory application.[57] In that context courts are asked only to measure the authority of

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[54] *Id.* at 16.

[55] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[56] *E.g., id.*, United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J. concurring); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221-23 (1974); Frothingham v. Mellon, 262 U.S. 447, 488 (1923). *But see* Flast v. Cohen, 392 U.S. 82, 100 (1968): "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of power problems related to improper judicial interference in areas committed to other branches of the Federal Government."

[57] And the majority chooses to discuss the zone test only in its statutory application. Maj. op. at 15. For an example of the use of the zone test in the context of a constitutional challenge to a state statute, *see* Boston Stock Exchange v. State Tax Comm'n, 97 S.Ct. 599, 602 n.3 (1977).

executive action under applicable statutes.[58] Such suits represent routine, accepted and legitimate exercises of judicial power,[59] so much so that the Supreme Court has repeatedly held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).[60] Standing doctrine and reviewability doctrine raise identical issues about the nature of the judicial role in the context of statutory review of executive action. The unproblematic nature of that role is reflected in the generosity of the *Abbott Laboratories*' standard of reviewability, and it should be reflected in an equally generous standard for standing, assuming, of course, that the injury in fact requirement of Article III has been met. And this, I take it, is the underlying significance of the very liberal standards of *Arnold Tours* and *Investment Co. Institute*.[61]

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[58] Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[59] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 39 (Supp. 1977).

[60] *See, e.g.*, Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Barlow v. Collins, 397 U.S. 159, 166-67 (1970). This court has noted that there is a "general rule that official administrative action is reviewable in courts when a person claims injury from an act taken by a government official in excess of his powers." Curran v. Laird, 420 F.2d 122, 128 (D.C. Cir. 1969) (en banc). *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970).

[61] There are very few decisions that find injury in fact but that deny standing on the basis of the zone test. K. C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11, at 510 (1976). *See* Gifford-Hill & Co., Inc. v. FTC, 523 F.2d 730 (D.C.Cir. 1975); Clinton Community Hospital Corp. v. Southern Maryland Medical Center, 510 F.2d 1037 (4th Cir.), *cert.*

B. *Technique in the Application of the Zone Test*

The majority devotes much of its opinion to a discussion of "the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing." [62] The majority first concludes that congressional intent must be determined from the specific applicable statutory provision and not from the statute as a whole. It offers two reasons for this prescription: such a specific focus will ensure "complete adversariness," and it will reduce the possibilities of endless litigation that would "distort the role of the courts in relation to the legislative branch." [63]

I have difficulty following the majority's reasoning. If the basis of the zone test is the discernment of congressional purpose, a court should use whatever material is relevant to that inquiry. As Chief Justice Marshall advised a very long time ago, "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). A traditional canon of statutory interpretation is that laws are to be read as a harmonious whole.[64] "It is undoubtedly a

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denied, 422 U.S. 1048 (1975); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[62] Maj. op. at 16.

[63] *Id.* at 17-18.

[64] "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" Richards v. United States, 369 U.S. 1, 11 (1962). "Emphasis should be

well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole." *Id.* Contradictory interpretations of differing statutory sections are avoided on the assumption that statutes constitute the expression of a coherent purpose, not a patchwork of conflicting intentions.[65] Thus consideration of an entire statute is often considered necessary to an informed interpretation of any of its particular sections. And this procedure, not surprisingly, has been a standard technique among courts applying the zone test.[66]

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laid . . . upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940). *See* Philbrook v. Glodgett, 421 U.S. 707, 713-14 (1975); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 631-32 (1973); United States v. Alpers, 338 U.S. 680, 684 (1950); Markham v. Cabell, 326 U.S. 404, 411 (1945).

[65] NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); FPC v. Panhandle Eastern Pipeline Co., 337 U.S. 498, 514 (1949); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 488 (1947).

[66] *See, e.g.*, Eliis v. Department of Housing and Urban Development, 551 F.2d 13, 16 (3d Cir. 1977); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049,-6050,-6059, slip op. at 1096 (2d Cir. 23 December 1976); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33-34 (3d Cir. 1976); Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1086 (6th Cir. 1975); Thompson v. Washington, 497 F.2d 626, 632 (D. C. Cir. 1973); Davis v. Romney, 490 F.2d 1360, 1365 & n.3 (3d Cir. 1974); Constructores Civiles de Centroamerica v. Hannah, 459 F. 2d 1183, 1188-89 (D. C. Cir. 1972); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

The majority's attempt to distinguish *Constructores Civiles*, maj. op. at 18-19, simply will not wash. The majority states that "[i]n *Constructores* it was acceptable to examine both

The majority's reasons for abandoning this traditional approach are simply not convincing. The "complete adversariness" that it seeks, aside from being logically unconnected to the question of how many statutory provisions are at issue, is adequately served for the purposes of standing by the injury in fact suffered by the plaintiff. This injury ensures that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And I am even more baffled by the majority's second reason, that focusing on a particular statutory section will create the possibility of endless litigation that "would distort the role of the courts in relation to the legislative branch." Examination of a particular provision in the context of an entire statute will increase the accuracy of judicial discernment of congressional purpose. And I cannot comprehend how accurately ascertaining congressional purpose can possibly distort the role of the courts with respect to Congress. Surely, the majority does not mean to argue that the possibility of increased litigation, by itself, would constitute such a distortion.

Perhaps as an illustration of its analysis, the majority blends into its theoretical reasoning a specific discussion

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particular and general provisions because those provisions shared an identity of purpose." Whether two provisions of a statute share a common purpose is a conclusion that can only be reached *after both provisions have been examined*. It therefore cannot function as a criterion of whether to examine both provisions in the first place. Driven by the illogic of their position, the majority ultimately concedes that in *Constructores* "it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose." But this reason, of course, would justify examining the general provisions of a statute *in every case*.

of the Internal Revenue Code. The Code, it notes, "does *not* have a single, unified purpose," and, therefore, litigants should not be permitted to borrow "the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident . . . ." [67]

As a conclusion this observation is unimpeachable, but it begs the real question. Even assuming, arguendo, that the relevant zone of interests emanates only from a particular provision of the Code rather than from the Code as a whole, the question of whether one provision of the Code is relevant to the interpretation of another can only be answered *after both provisions have been examined*. It is not a question that can be addressed in the abstract. Yet this is just what the majority opinion, drawing on its theoretical analysis, purports to do. *A fortiori* the majority completely misses the thrust of appellant Field's argument that, although various sections of the Code have different goals, the *entire* Code is infused with certain general purposes.[68] These general purposes, he claims, arguably give rise to a zone of protected interests that emanates from the Code as a whole. The majority rejects this argument on the grounds of nothing more convincing than bald assertion.

The majority reaches a second major conclusion concerning proper technique in the application of the zone test: the examination of legislative history is to be avoided and the appropriate zone determined from "the face of

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[67] Maj. op. at 18.

[68] Appellant refers to the General Statement of H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954), that accompanied the enactment of the Internal Revenue Code of 1954: "In general, the purpose of these changes has been to remove inequities, to end harassment of the taxpayer and to reduce tax barriers to future expansion of production and employment."

the statute." [69] The majority is aware that courts regularly resort to legislative history in order to discern the intent of Congress. It shows less awareness that courts also regularly use legislative history for the same purpose in the application of the zone test.[70] The majority argues, however, that there are three special reasons why this latter practice should cease. First, the examination of legislative history will lead to a prejudgment of the merits of the case. Second, it is likely to be unilluminating; and third, it will undermine the generous nature of the zone test.

Taking these reasons in order, there is, first, no logical connection between the use of legislative history and a prejudgment of the merits of the case.[71] The majority thus seems to be making a psychological point: "A canvassing of the entire legislative background may lead to

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[69] Maj. op. at 21. It would be well to remember the counsel of Justice Reed: "When aid to construction of the meaning of words, as used in [a] statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-44 (1940).

[70] *See, e.g.*, Safir v. Kreps, 551 F.2d 447, 451 (D.C.Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3013 (U.S. July 11, 1977) (No. 77-65); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388, 390 (1st Cir. 1977); Hayes International Corp. v. McLucas, 509 F.2d 247, 256 (5th Cir.), *cert. denied*, 432 U.S. 864 (1975); Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 n.2 (D.C.Cir.), *cert. denied*, 419 U.S. 1038 (1974); Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973); Higgenbotham v. Barrett, 423 F.2d 745, 749 (5th Cir. 1975); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 955 (9th Cir. 1971); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[71] I agree with the majority, however, that standing and the merits are, and should remain, distinct issues.

a decision on the question of standing based on an assessment of the strength or weakness of the claims being presented." [72] The majority's assumption appears to be that federal judges will not be able to keep distinct issues of standing and of the merits when confronted with information relevant to both. I reject this assumption as completely unfounded. We trust federal judges to successfully perform such tasks all the time, as for example when ruling on the admissibility of evidence in non-jury trials. Standing and the merits require distinct inquiries, and federal judges are perfectly capable of using legislative history to answer the demands of each.

Second, legislative history may indeed be "unilluminating," but it also may be helpful, and there is no way of knowing until one looks. Legislative history can be and often is an important instrument in the determination of congressional intent.[73] The majority's proscription of legislative history in all cases simply because of its failure in some, reminds me of the gourmet who, having once tasted sour grapes, refused to eat anything.

Finally, there is simply no way to predict whether the resort to legislative history will expand or contract the the generosity of the zone test.[74] The results will vary from case to case. What is clear, however, is that if the determination of congressional intent is relevant, the use

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[72] Maj. op. at 19-20.

[73] *E.g.*, Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 687 (1949) (Frankfurter, J., dissenting, Appendix A).

[74] There is something deeply ironic in the majority's justifying its exorcism of legislative history on the grounds of defending the generosity of the zone test at the very same time as it deafens itself to appellant's arguments that, on the basis of legislative history, he is arguably within the zone of interests to be protected. *See* note 68 *supra*.

of legislative history may lead to more *accurate* applications of the test. The generosity of the test will be sufficiently protected by the legal standard that resolves in plaintiff's favor all "potential ambiguities in the legislative history" and in the face of the statute.[75]

C. *The Application of the Zone Test to Appellant Field*

The majority is aware of "the confusion surrounding the meaning of which interests are relevant to the zone test," and it concludes that what must "fall within the relevant zone" is "the particular interest the parties are asserting in the litigation." [76] Yet the majority denies Field standing because "the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes" and "appellant Field cannot be said to fall within the regulatory field of concern." [77] *Therefore*, the majority argues, Field's interests cannot arguably have been intended to have been protected by § 901(b). In other words, contrary to its own advice, the majority acts as if the zone test requires the *plaintiff himself* to be within the statutory zone.

The majority's conclusion that a plaintiff's interests must fall within the relevant zone, however, is correct. *Arnold Tours* and *Investment Co. Institute* make clear that a plaintiff will satisfy the zone test if he asserts interests upon which the applicable statute will have a readily foreseeable impact.

Using this framework of analysis, the interests Field asserts are arguably within the zone of interests to be protected by § 901(b). A primary purpose of that sec-

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[75] Maj. op. at 21.

[76] *Id.* at 20 n.76.

[77] *Id.* at 23.

tion, as the majority clearly establishes, is to prevent the double taxation of United States corporations operating abroad. But this purpose is itself founded on the deeper principle that, as one noted scholar of the foreign tax credit has put it, "taxpayers with an equal taxable capacity should bear an equal United States tax burden. . . . [T]he result of the operation of the credit is that United States corporations . . . with the same amount of income bear an equal total tax burden on income whether or not they are subject to foreign income taxation." [78] The section thus establishes an equation of rough equality between United States corporations that must pay certain foreign taxes and those that have tax liability only to the United States government. If the IRS were mistakenly to deny a valid application for a foreign tax credit, one side of this equation would be violated. Similarly, if the IRS were mistakenly to grant a foreign tax credit, the equation would be violated on the other side. This is essentially Field's position. He claims that his interests in tax parity with his competitors who import foreign oil are implicit in the structure of § 901(b) and that his interests are therefore arguably within the zone of interests to be protected by the section.

The legislative history of § 901(b) is silent about congressional concern for those in Field's circumstances. The readily foreseeable consequences of the foreign tax credit on Field's competitive situation, however, is powerful support for his claim. His position is indistinguishable from that of the plaintiff travel agents in *Arnold Tours* or that of the plaintiff investment companies in *Investment Co. Institute*. I would therefore grant standing to appellant Field.

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[78] E. OWENS, THE FOREIGN TAX CREDIT 3 (1961).